



The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1930



The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, January 21, 1931.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department for the year ending November 30, 1930.

Very respectfully,

JOSEPH E. WARNER,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL, State House.

Attorney General.

JOSEPH E. WARNER.

Assistants.

FRANKLIN DELANO PUTNAM.¹

ROGER CLAPP.

CHARLES F. LOVEJOY.

EMMA FALL SCHOFIELD.

GERALD J. CALLAHAN.²

JAMES S. EASTHAM.¹

R. AMMI CUTTER.³

EDWARD T. SIMONEAU.

STEPHEN D. BACIGALUPO.

GEORGE B. LOURIE.

LOUIS H. SAWYER.

EDWARD K. NASH.⁴

DAVID A. FOLEY.⁵

DONALD C. STARR.⁶

Chief Clerk.

LOUIS H. FREESE.

Cashier.

HAROLD J. WELCH.

¹ Resigned December 31, 1929.

² Resigned January 15, 1930.

³ Resigned March 14, 1930.

⁴ Appointed January 1, 1930.

⁵ Appointed January 16, 1930.

⁶ Appointed March 19, 1930.

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STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Fiscal Year.

General appropriation for 1930	\$107,000 00
Appropriation for small claims	5,000 00
Supplemental appropriation	34,000 00
Publication of opinions of the Attorneys General	4,000 00

\$150,000 00

Expenditures.

For salary of Attorney General	\$8,000 00
For law library	558 25
For salaries of assistants	47,643 83
For salaries of all other employees	20,990 00
For legal and special services	27,575 45
For office expenses and travel	6,097 57
For court expenses	14,687 17
For small claims	4,410 36

Total expenditures \$129,962 63

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, January 21, 1931.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, I herewith submit my report.

The cases requiring the attention of this Department during the year ending November 30, 1930, to the number of 9,731 are tabulated below:

Corporate franchise tax cases	1,207
Extradition and interstate rendition	339
Land Court petitions	103
Land-damage cases arising from the taking of land:	
Department of Public Works	91
Department of Mental Diseases	5
Department of Conservation	1
Department of Correction	3
Metropolitan District Commission	60
Metropolitan District Water Supply Commission	7
Miscellaneous cases	1,090
Petitions for instructions under inheritance tax laws	47
Public charitable trusts	291
Settlement cases for support of persons in State hospitals	13
All other cases not enumerated above, which include suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth	6,440
Indictments for murder, capital cases	34
Disposed of	25
Now pending	9

I. ADMINISTRATION OF CRIMINAL JUSTICE.

The functions of the office of the Attorney General embrace both the civil and criminal fields. The Attorney General is the legal adviser of the Governor, the Legislature, all the departments and every state official, in matters relating to the official business of the Commonwealth. He is also the attorney for the Commonwealth, its departments, officers and commissions, in all litigations, whether in the state or federal courts. As the chief law officer of the Commonwealth, he takes cognizance of all violations of the law affecting the welfare of the people and acts for the Commonwealth in the preparation and scrutiny of all its legal affairs.

The scope of the authority of the Attorney General is coincident with that of the district attorneys, and, as chief law officer, he may call upon them to co-operate with him in the prosecution of such cases and to perform such acts relating to criminal matters as by law he is not required to prosecute or perform himself. (G. L., c. 12, §§ 20, 27.)

Misdemeanors are tried by district courts; misdemeanors appealed therefrom and felonies are tried by the Superior Court. The Attorney General and the eight district attorneys are designated by law to prosecute crime in the Superior Court.

The administration of the district attorneys¹ has been uniformly notably efficient, as reflected by the present excellent status of their dockets, which reveal activity and preparedness of the Commonwealth for expeditious trial of crimes — an objective of the conference and plans of the Attorney General and district attorneys two years ago. These dockets, too, are an index of the prevalence of crime itself.

In the Western District, comprising the two counties of Berkshire and Hampden, District Attorney Clason reports achievement this year of clearance of the criminal docket of every triable case, with 10 felonies and 23 misdemeanors now pending because circumstances prevent disposition. As to the felonies, disposition was prevented by continuing imprisonment of 4 defendants under former sentences, and by absence of witnesses or inability to secure arrest of defendant in others. As to the misdemeanors, pleas have already been received in 7 cases, and in the others early disposition may be expected upon completion of payments under court orders, restitution of moneys, trials upon their civil aspects, and completion of sentences now being served for other offenses.

In the Northwestern District, comprising the two counties of Franklin and Hampshire, District Attorney Fairhurst so accomplished clearance

¹ Western District (Berkshire and Hampden Counties), Charles R. Clason.

Northwestern (Hampshire and Franklin Counties), Charles Fairhurst.

Middle (Worcester County), Edwin G. Norman.

Northern (Middlesex County), Robert T. Bushnell.

Eastern (Essex County), William G. Clark.

Suffolk (Suffolk County), William J. Foley.

Southeastern (Norfolk and Plymouth Counties), Winfield M. Wilbar.

Southern (Bristol, Barnstable, Dukes and Nantucket Counties), William C. Crossley.

of the dockets of both counties that there are no felonies pending, and in Hampshire County, aside from a few suits on recognizance, but 1 misdemeanor, and in Franklin County but 6. These latter cannot be disposed of because of the adjournment of the court. In Hampshire County alone, during these four years, he returned to the county treasury of his appropriation for criminal work approximately \$50,000.

In the Middle District (Worcester County) District Attorney Norman reports 17 felonies and 29 misdemeanors.

In the Northern District (Middlesex County) District Attorney Bushnell reports 374 cases pending. Of the 155 felonies, defendants have not been apprehended in 62, and a plea of guilty has been made in 1. Of the 219 misdemeanors, unapprehended defendants account for 82, and pleas of guilty, for 17. There were 5 capital cases pending, but trial has been had in 2.¹

In the Eastern District (Essex County) District Attorney Clark, the learned, able and experienced dean of our prosecutors, is voluntarily retiring after eleven years of service, and leaves the docket in an excellent condition, with very few felonies and comparatively few misdemeanors. There is 1 homicide case pending, which it is expected will be disposed of at the coming session.

In the Suffolk District (Suffolk County) District Attorney Foley disposed of all murder cases, and no defendant is awaiting trial. One hundred and sixty felonies and 855 misdemeanors are pending.

In the Southeastern District, comprising the two counties of Norfolk and Plymouth, District Attorney Wilbar reports 11 felonies, 25 misdemeanors from Plymouth; 6 felonies, 18 misdemeanors from Norfolk. The defendant has not yet been apprehended in the pending capital case.

In the Southern District, comprising the four counties of Bristol, Barnstable, Dukes and Nantucket, District Attorney Crossley reports a total of 591 cases pending, and of these 509 are in Bristol. Of the 195 felonies, 40 are pending for the reason that they have arisen since court sittings, 56 because defendants have not been apprehended, while 12 have defaulted. Of the 402 misdemeanors, 30 have arisen since court sittings; in 32, defendants have not been apprehended, and 33 have defaulted. Hence the actual condition of the criminal docket at the last court sittings prior to November 30th showed but 87 felonies, 286 misdemeanors in Bristol; 18 misdemeanors in Barnstable; 2 misdemeanors in Nantucket; and 1 in Dukes. Varying circumstances prevented trial in many cases, while the fact of division of the entire list into four counties naturally prevents intensive disposition of cases in any one county.

The list of capital cases in detail is annexed (page 29).

Freedom from congestion in our criminal dockets makes it indisputably apparent that in Massachusetts the criminal may not profit through the

¹ Since November 30, the remaining 3 capital cases have been tried; 111 felonies and 187 misdemeanors disposed of.

traditional law's delays. Our system of procedure (begun in 1923) whereby judges of the district court, sitting in the Superior Court, hear misdemeanors, and judges of the Superior Court are free to hear felonies, has proved its efficacy in facilitating and expediting justice.

General increase in crime, if such be alleged, may not be charged to inactivity of courts, prosecuting officers, or to congested dockets here in Massachusetts.

From the report of the district attorneys, there has been no general increase in crime, nor any signal increase in any particular crime. Of serious offenses, embezzlement — theft of money with which one has been entrusted — is slightly more apparent. Of the lesser offenses, automobile violations account for any numerical increase.

All of this plainly testifies that the average citizen of Massachusetts is both law respecting and law observing.

Nor has a single complaint been received of "racketeering" — that is, the exaction of tribute from trades or businesses for immunity from destruction of property or from interference with business.

Freedom from this predatory invasion is both to the credit and vigilance of our police, and to a healthy public sentiment unwilling to tolerate or countenance infamous tribute for honest livelihood.

Recommendation of the District Attorneys.

The recommendation of the district attorneys is as follows:

The penalty for breaking and entering a building, ship or vessel in the nighttime, with intent to commit a felony, is not more than twenty years in the state prison (G. L., c. 266, § 16), and for breaking and entering in the daytime or entering in the nighttime without breaking and putting in fear any person lawfully therein, not more than ten years (c. 266, § 17).

The district attorneys suggest as an alternative jail imprisonment for not more than two and one half years.

This recommendation is occasioned by experience in disposition of cases where defendants are young. This amendment enables the court to exercise a discretion with respect to such defendants.

II. ADMINISTRATION OF CIVIL BUSINESS.

A. Cases Decided During the Year.

1. IN THE SUPREME JUDICIAL COURT.

Decisions were received in four¹ cases relating to the validity of taxes imposed by the Commonwealth, and in seven² cases relating to miscellaneous subjects.

B. Cases Pending November 30, 1930.

1. IN THE UNITED STATES SUPREME COURT.

(a) *Interstate Controversy.*

The State of Connecticut v. Commonwealth of Massachusetts. During the months of February, March and April, of this year, hearings were held in Boston and in Hartford before Hon. Charles W. Bunn, of St. Paul, Minnesota, Special Master appointed by the Supreme Court of the United States to pass upon the pending water controversy between Connecticut and Massachusetts. A very large amount of engineering testimony was introduced before the Special Master dealing with the effect of the proposed diversion of certain of the head waters of the Ware River and the Swift River for the purpose of supplying the Metropolitan District with drinking water. Connecticut contended that the diversion would so diminish the flow of the Connecticut River in Connecticut as to injure navigation, to affect agriculture adversely, to increase the pollution of the river, and to destroy fish life and water power.

The Special Master found that Connecticut would not in any way be substantially injured by the Massachusetts project and filed a report with the Supreme Court, toward the end of May, advising and recommending that a decree be entered dismissing the bill brought by Connecticut, without prejudice. His recommendations and the report itself were entirely favorable to the position taken by Massachusetts.

Connecticut, thereupon, alleged seventy-five exceptions to the report

¹ *Allen v. Commissioner of Corporations and Taxation*, Mass. Adv. Sh. (1930) 1799, held that only so much of the gain on the sale of rights was taxable as represented the difference between the sale price and the value of the rights on the day they were received by the taxpayer.

Hutchins v. Commissioner of Corporations and Taxation, Mass. Adv. Sh. (1930) 1749, held invalid a tax upon a Massachusetts resident, one of three trustees appointed under the will of a non-resident by a probate court in another state, upon income received by him as such trustee and accumulated for the benefit of unascertained remaindermen. The other two trustees were not residents of Massachusetts. Although the statute directed the Commissioner to impose this tax, the court held that its imposition to the extent assessed by the Commissioner was beyond the jurisdiction of Massachusetts and refused to apportion the tax because the statute made no provision for such apportionment.

Dodge v. Commissioner of Corporations and Taxation, Mass. Adv. Sh. (1930) 2153, held that a dividend declared by a foreign corporation (Pullman Company) to a resident of Massachusetts, during the process of the reorganization of that foreign corporation, is taxable as a dividend under G. L., c. 62, § 1, and is not to be treated as a transfer of stock during the reorganization under G. L., c. 62, § 5, cl. (c). (About \$250,000 in taxes was involved in this decision, and this amount was saved to the Commonwealth.)

Williams et al., Trustees, v. Commissioner of Corporations and Taxation, Mass. Adv. Sh. (1930) 1527, held that the petitioners, trustees of a real estate trust, were, in making income tax returns, entitled to deduct from gains derived from the sale of certain real estate, the taxes paid on all the real estate held by them, plus five per cent of the assessed value of such real estate.

² *Blankenburg v. Commonwealth*, Mass. Adv. Sh. (1930) 1485, on writ of error from conviction of

of the Special Master and an argument before the Supreme Court of the United States upon these exceptions took place on January 5, 1931.

Exhaustive briefs have already been filed by each side covering all phases of the controversy.

(b) *Tax Cases.*

*Harold J. Coolidge et al., Trustees, v. Commissioner of Corporations and Taxation*¹ involves the constitutionality of a Massachusetts succession tax upon property passing in 1925 to children of the settlors under a trust instrument, executed in 1907, when there was no tax upon the same; the trust instrument being irrevocable and, by a later assignment, no beneficial interest being retained in the settlors.

2. IN THE SUPREME JUDICIAL COURT.

There are 33 cases pending, some of which have already been argued; 23 are grouped in the Billboard Cases; 5² concern taxation; the others³ involve various matters.

Blankenburg for criminal contempt growing out of conspiracy to defraud the estate of the late Lotta Crabtree, held that the probate court has power to punish one for contempt of court in committing perjury.

Scott v. Commissioner of Civil Service, Mass. Adv. Sh. (1930) 1471. One who enlisted and served in the United States Navy after the armistice but before the signing of the treaty of peace is not a veteran within the Veterans' Preference Act.

Merrymount Co. v. Metropolitan District Commission, Mass. Adv. Sh. (1930) 1731. Taking of petitioner's land under eminent domain proceedings held valid.

Dugdale v. Board of Registration in Medicine, Mass. Adv. Sh. (1930) 179. Decision of board revoking petitioner's registration held valid.

Mayor of Lynn v. Commissioner of Civil Service, Mass. Adv. Sh. (1929) 2399. Veterans' Preference Act held constitutional.

Rawding v. State Fire Marshal, Mass. Adv. Sh. (1930) 1577, held that the Fire Marshal, in passing upon an application for a permit to store inflammable compounds outside the metropolitan district, can consider only the question of fire hazard.

Sullivan v. Judges of the Superior Court, Mass. Adv. Sh. (1930) 1143, held where petitioner, by writ of prohibition sought to enjoin the justices of the Superior Court from proceeding to examine the mental condition of a petitioner appearing in an action of tort before a justice of the Superior Court, that G. L., c. 123, § 99 (providing for examination of mental condition of certain persons), applied to parties in civil proceedings and was not confined to persons charged with offenses.

¹ Argued December 8, 1930.

² *Worcester County National Bank, executor under the will of Herbert I. Wallace, v. Commissioner of Corporations and Taxation*. Whether or not the conveyance of property to take effect on death of grantor in consideration of marriage is a bona fide transfer for such full consideration as to bring the property within an exemption in the inheritance tax law. Argued.

Boston Safe Deposit & Trust Co. v. Long. Whether interest accrued prior to a testator's death and received by his executor is taxable as income.

Central Trust Company v. Howard. Whether the Commonwealth is restrained by the provisions of St. 1930, c. 214, from collecting certain taxes from the complainant.

Thomson Electric Welding Company v. Commonwealth. Whether the plaintiff corporation is entitled in the determination of its excise tax to have deducted from its net income the amount received from royalties from United States patents.

First National Bank of Boston, Trustee, v. Long. Whether gains resulting from sales by a trustee under a revocable trust can be determined for income tax purposes on the basis of cost to the donor.

³ *Kerwin, adm. d. b. n. c. t. a., v. Attorney General et al.*, concerning a certain charitable bequest under a will. Where power to designate the charities was vested in five executors, whether the surviving executor under the will had power to designate the charities, and if so, whether he made a proper designation. Argued December 5, 1930.

Standard Oil Company of New York v. Commissioner of Public Safety. Whether the person, appealing to the State Fire Marshal from the decision of the Board of Street Commissioners granting a license, is a "person aggrieved" and so has a right to appeal.

The most important are the so-called Billboard Cases, testing the validity of certain rules and regulations of the Department of Public Works relating to location and size of billboards.

Hearings before the master were closed December 26, 1929, under a day to day order urged by the Commonwealth. Exhaustive analysis of the testimony has followed. The immediate phase of these cases concerns proceedings relating to contents of the master's report recently drafted. Much detail must precede formal presentation of the final report to the court.

III. STATUTORY SERVICES OF INTEREST.

1. Small Claims.

St. 1924, c. 395, provides that claims against the Commonwealth, where there is no statutory authority for prosecuting them by suit, or other mode of redress provided by law, may be presented to the Attorney General, and, if he finds damages under \$1,000, the claims may be paid. If the damages exceed \$1,000 the facts are reported to the Legislature. Fifty-six claims were presented under this act, of which 26 were approved, after investigation or hearing, and \$4,460.86 was paid to the claimants; 10 were rejected; 20 are still pending. Of the 26 claims paid, 15 (58 per cent) arose out of collisions with state-owned cars; the rest were for injuries arising out of defects in state-owned property; for losses of personal property at state institutions; and for various causes.

2. Election Inquests.

G. L., c. 55, § 40, provides that in all cases where a justice of a district court holds an inquest to inquire into alleged violations of law relating to corrupt practices in connection with primaries, caucuses or elections, "the attorney general, the district attorneys, or some person designated by them, shall attend the inquest and examine the witnesses." There were only two inquests this year, and an Assistant Attorney General was designated to conduct the examination in both.

3. Public Charitable Trusts.

When money or property has been left in trust for some charitable purpose of public rather than private benefit, the Attorney General represents the public in all cases where such a trust exists. This involves examination of all petitions by charities for permission to sell property sub-

Ott v. Board of Registration in Medicine. Petition to reverse an order of the board revoking the petitioner's registration.

McGoldrick v. Commissioner of Civil Service. As to the right of the Mayor of Somerville to appoint the petitioner in charge of the municipal employment bureau without certification from the Civil Service Commissioner.

Goldberg v. Commissioner of Civil Service. Whether the petitioner has become separated from the service so that he cannot be reappointed without the approval of the Civil Service Commissioner.

ject to a trust, or to dissolve and transfer assets to another corporation upon the same charitable purposes; examination of accounts of trustees; rendition of assistance to the court in the matter of appointment of new trustees for charitable purposes; participation in litigation affecting any bequest to Massachusetts charities.

It also involves proceedings for application of the *cy pres* doctrine, that is, when a trust can no longer be carried out according to its exact terms, proceedings are taken for the purpose of determining the application and use of the trust in a way most nearly like the original.

One of the outstanding pending proceedings is the petition of the Trustees of the Andover Theological Seminary seeking authority to affiliate with the Newton Theological Institution. Since a decision of the Supreme Judicial Court, reported in 253 Mass. 256, that the Andover Theological Seminary could not affiliate with Harvard, under the terms of the founders of the trust, Andover Theological Seminary has ceased to operate. The question in litigation concerns in particular the so-called "Andover Creed", formulated in 1808, and requires, among other things, determination of existence of an institution continuing to subscribe, or having a faculty subscribing, to such creed, or an institution subscribing to a creed most nearly like it.

Another important case related to the amalgamation of the First Parish Unitarian Church in Walpole, the Methodist Episcopal Church of Walpole and the Walpole Congregational Church into the United Church of Walpole, whereby their united financial resources effect a strong church.

4. Administration of Estates by Public Administrators.

When a person dies leaving an estate, the estate must be administered by someone. When such a person dies without a will and without any known heirs, the law provides for the administration of the estate by a public administrator under bond, and that all the estate, after payment of debts and expenses, shall be payable to the state treasury. The only notice to the Commonwealth of public administration cases, is by service upon the Treasurer and Receiver General of the petition for appointment and the allowance of final accounts.

If, after public administration has been granted, representations are made to the probate court that there are known heirs, administration is granted, upon proper petition without notice to the public administrator or to the Treasurer and Receiver General, and the administrator appointed supersedes the public administrator.

The law requires that public administrators render an account at the expiration of one year from the date of appointment. In the event an estate has been closed by the public administrator and the money has been paid into the state treasury, an heir may, within six years thereafter, petition for administration and upon appointment the Treasurer and Receiver General shall repay to him such money. (G. L., c. 194, §§ 14 and 15.)

Public administrators are appointed by the Governor for a term of five years. The law designates the number to be appointed in each county, and there are now 54 in the entire State.

I have made an extensive examination to ascertain the number of estates in process of administration by public administrators, the aggregate value of the estates, the value of estates remaining unclosed after the expiration of two years from the date of grant of administration, the occasion for failure to close estates, and sufficiency of the bonds to cover the value of estates administered by each administrator. Replies were received from all public administrators, except one.¹

There are 470 cases in process of administration by public administrators, with balances outstanding of \$480,785.82. Of these, 182 are of more than two years' standing, with balances of \$132,804.46. Of these 182 estates, there are 37 with balances of \$43,737.90, in which insolvency, determination of claims against or in favor of the estate, or existence of heirs, prevented closing within that period. This leaves 145 estates more than two years old, with reported assets of \$89,064.56, which, after deduction of administration expenses and allowance of final accounts, are eligible for escheat to the state treasury; of these 145, one public administrator had 121 in process of administration, with assets of \$69,974.37.² All are covered by a sufficient bond.

Forty-one estates await appointment of public administrators in succession to two public administrators recently deceased, who had been administering them.³

Under the provisions of G. L., c. 194, § 2, a public administrator may file a special bond in each case, or a general bond covering all his estates, for faithful administration. Fifteen public administrators filed general bonds. All five in Suffolk County did so. Five general bonds are for less sums than the total assets in estates accumulated since such bonds were filed.⁴ These bonds ranged from \$2,000 to \$5,000, and represented

¹ Frank H. Snow, Franklin County, whose term expired July 29, 1930.
² Frank Leveroni, Suffolk County. As this report is filed, 69 of the 121 have since been closed, and \$30,056.40 has been paid into the treasury; so that of the \$89,064.56 in process of administration in the Commonwealth, the amount eligible for escheat from all public administrators is \$59,008.16, minus administration expenses.
³ James J. McCarthy, Suffolk County, 34 estates.
W. Frederic Davis, Middlesex County, 7 estates.

⁴ Essex County.							
Guy Newhall	general bond	.	.	.	.	.	\$2,000 00
	assets	.	.	.	.	.	2,717 71
Archie N. Frost	general bond	.	.	.	.	.	\$3,000 00
	assets	.	.	.	.	.	11,795 24
Worcester County.							
A. Z. Goodfellow	general bond	.	.	.	.	.	\$2,000 00
	assets	.	.	.	.	.	15,962 59
E. Bert Johnson	general bond	.	.	.	.	.	\$2,500 00
	assets	.	.	.	.	.	11,173 16
Harry J. Meleski	general bond	.	.	.	.	.	\$5,000 00
	assets	.	.	.	.	.	14,748 15

assets from \$2,717.71 to \$15,962.59. All the other public administrators, namely, thirty-nine, filed a special bond in each estate. As public administrators, acting under general bonds, must file "an account", namely, a list of all their estates having balances, once each year, the probate judges have all the information regarding administrations in their own courts, and might have exacted, if they had deemed it requisite, increases in these general bonds.

Approval of amount of bond and grant of administration under an adequate bond rest with the probate judges. Requirement of a special bond for each estate would eliminate the possibility of existence of assets in cumulative estates in excess of the original general bond.

I therefore recommend repeal of G. L., c. 194, § 2, lines 5-36, providing for a general bond.

G. L., c. 194, § 16, provides that district attorneys shall proceed against public administrators who neglect to return an inventory, settle an account or perform other duties in relation to an estate, and insure payment of all balances to the Treasurer where there are no heirs. The Attorney General should have like power. There is no provision of law, however, whereby either district attorneys or the Attorney General may be informed of those cases where accounts have not been filed, or, if filed, have not been presented to the court for allowance. As the situation now is, unless public administrators file general bonds and comply with the laws applicable to such cases, requiring them to render an accounting each year, it is impossible to determine from the court records how many cases a public administrator has, unless the names of the estates are known.

I recommend legislation requiring a register of probate to report to the district attorney for the district where the administrator received his letters, and also to the Attorney General, all cases in which accounts are due or filed, but not presented to court for allowance, and to index all public administration cases under the names of the various public administrators, so that information regarding such cases may be speedily ascertained.

I renew the recommendation in my report of 1928 that in a case where a public administrator has already been appointed notice of petitions for administration by alleged heirs be given to the public administrator concerned and to the Treasurer and Receiver General; that it be made discretionary with the probate court to permit the public administrator already appointed to continue to act if such continuance of service would best meet the public interest and the welfare of the estate. As the law now stands, under G. L., c. 194, § 7, no notice need be given to the public administrator, or to the Treasurer or to the Attorney General, when, after grant of public administration, alleged heirs seek administration.

In one case, upon petition, alleged heirs had their nominee appointed, and it later was learned that the petitioners were not heirs at all. As

the Commonwealth receives estates of persons dying without will or without known heirs, the Commonwealth ought to be informed of those cases wherein, after grant of public administration, persons alleging themselves to be heirs, seek the estate, that it may have at least opportunity to ascertain the legitimacy of the claim of heirship.

5. Extradition and Rendition of Fugitives from Justice.

There were 265 requests for the return of fugitives from justice referred to this department for examination, hearing and report during the past year.

Of these, 48 were requests from other States for the return of fugitives under arrest in this Commonwealth; and 217 were requests for the return of persons who had committed crimes in this Commonwealth and had subsequently fled to other jurisdictions, including 128 persons charged with desertion, non-support and neglect of wife and children. The return of every person wanted for crimes committed in this Commonwealth was secured through this department, with the exception of 3.

The sixth report of the Judicial Council (pp. 43-45) discusses the latest uniform extradition act. Members of the Judicial Council conferred with this department relative to such act. I concur in the Council's recommendations.

I particularly urge enactment of the provisions in sections 4 and 6 of the suggested draft act. (Report of Judicial Council, pp. 54 and 55.) They constitute material changes in our present law. The other sections of the proposed act are desirable legislation. They are in the nature of codification of the existing law as established and followed in Massachusetts by judicial decision and practice.

Section 4 of the draft act specifically embodies the provisions of 1930, House Document 68, § 16. It provides for the rendition of a defendant who has intentionally committed an act within this Commonwealth, which has resulted in a crime in another State, and who is, therefore, not technically a fugitive from justice from that State, and that the rendition of such person be made discretionary with the Governor, and not mandatory, as are the provisions of the present rendition law in respect to fugitives from justice.

In some States, notably New York, before submitting the uniform extradition act for consideration by the Legislature, the scope of this provision was further enlarged by providing for discretionary rendition from State A to State B of any person who has intentionally committed an act in State A, resulting in crime in State B, and who has subsequently fled to the jurisdiction of State A, where he has been found and arrested. The proposed draft would provide for a rendition only in case the fugitive is found in State C. The provision as proposed in New York is desirable from a practical standpoint. The addition of the words "or in a

third state" after the words "an act in this commonwealth", in section 4, lines 4 and 5, of the draft act, so enlarges its scope.

Section 6 of the draft act embodies the provisions of 1930, House Document 68, § 20 D. It provides that any officer qualified to serve criminal process may arrest without a warrant a fugitive from another State "upon reasonable information that the accused stands charged in a court of another state with a crime punishable by death or life imprisonment." I believe that this provision extends a protection to police officers of this Commonwealth which is very desirable, and concerning which there is uncertainty in our present law. (See *Scott v. Eldridge*, 154 Mass. 25, 27.) It will greatly facilitate the arrest of persons within this Commonwealth who have committed serious crimes in other jurisdictions. Other reasons appear in the report of the Judicial Council (pp. 48 *et seq.*).

Governor Roosevelt of New York vetoed the uniform extradition act on the ground that its provisions do not grant police officers power to make arrests without a warrant upon reasonable information that the accused stands charged with felony in another State. I am in accord with the view as expressed by him. The draft act proposed follows the uniform act and limits the power to make arrests without warrants to crimes "punishable by death or life imprisonment." In this Commonwealth a police officer may arrest without a warrant upon reasonable information in all felony cases. If it is desirable to make the power of police officers to make arrests without warrants for felonies committed outside of the Commonwealth co-extensive with their powers in regard to acts committed within the Commonwealth, substitution of the word "felony" for the words "crime punishable by death or life imprisonment", in section 6 of the draft, will accomplish it.

6. Industrial Accident Cases; Proceedings against the Commonwealth under the Provisions of G. L., c. 30; Approval of Contracts and Titles.

The department represented the Commonwealth at 16 hearings before the Industrial Accident Board and at 8 conferences in cases arising under the Workmen's Compensation Act (G. L., c. 152), providing for compensation to laborers, workmen and mechanics employed by the Commonwealth, who receive personal injuries arising out of and in the course of their employment.

The department also prepared or passed upon 480 contracts, 35 leases and 8 easements as to form; and 195 deeds as to both legal form and title.

Under G. L., c. 30, § 39, as amended, relating to certain liens against security for the construction of public works, 15 cases were closed; 16 are pending. Under G. L., c. 258, § 1, 3 cases arising out of contracts with the Commonwealth for the construction of public works were concluded.

7. Service rendered to Special Recess Legislative Commission.

Under authority of chapter 28 of the Resolves of 1930, which directed a revision, simplification and codification to be made of the laws of the Commonwealth relating to marine fisheries, including shellfish, I appointed Assistant Attorney General Donald C. Starr to serve as a member of the Commission undertaking this work.

In addition to the general laws relating to this subject, there is a large number of special enactments, extending from the early days of the Bay Colony to the present time. These are being collected and indexed, and made more readily accessible for reference. This will not only result in greater efficiency in the enforcement of regulatory provisions, but will also provide for the guidance and consequent protection of those deriving gain and livelihood from the shellfish and free-swimming fish industries.

8. Opinions.

Opinions of interest are annexed.

V. GENERAL OBSERVATIONS.

1. That the Attorney General may have Power to Summon Witnesses.

I have in my last two reports pointed out that the Attorney General has no power in an independent inquiry to summon witnesses, examine them under oath, or require the production of records, that he may effect a thorough investigation of matters, civil as well as criminal, concerning the public peace, public safety and public welfare. An attorney general, devoid of this authority, may not accomplish a vigorous and searching investigation for the ascertainment of facts in matters actually affecting the welfare of the people, as, for instance, fraudulent claims under the compulsory insurance act or violations of the "Sale of Securities Act." I therefore renew my recommendation that such power be granted.

2. Clarification of the Law authorizing the Summoning of Witnesses in Certain Criminal Proceedings.

G. L., c. 218, § 37, and c. 233, § 1, authorize the summoning of witnesses in criminal proceedings. As to whether district courts have the power thereunder to compel the attendance of witnesses before them after complaint but before the issuance of process, a varying practice indicates some doubt. In order that this doubt may be resolved, I recommend that the General Laws be amended to set forth clearly their authority.

3. Regulations enabling Some Measure of Information concerning Any Organization engaged in the Solicitation of Charity, as to its Collectors and Use of the Moneys collected.

To minimize the exploitation of funds collected on the streets from the public, for charitable purposes, I recommend legislation that such organizations be required to keep true records of the names and addresses of all solicitors or collectors employed by them and the amounts collected and expended, together with the nature of the expenditures; and that such records be open to inspection by the Departments of Public Welfare of the State or cities and the selectmen of the towns, at any time.

4. Relative to Power of Police Officers to arrest Persons for Operating while under the Influence of Liquor.

I renew the recommendation made by me last year that the police officers have the same powers which investigators and examiners appointed by the Registrar of Motor Vehicles have, to arrest persons operating motor vehicles while under the influence of intoxicating liquor. As the law now is, a police officer cannot arrest a person *on such charge* without a warrant if the person has his license to operate in his possession. An investigator or examiner appointed by the Registrar of Motor Vehicles has the authority to make an arrest for such a violation, "irrespective" of whether or not the operator has with him his license to operate the motor vehicle.

A bill introduced in the Legislature at the last session granting this additional power to police officers failed of passage during one of the final stages.

I recommend, therefore, an amendment of G. L., c. 90, § 21, as amended by St. 1921, c. 349, enabling a police officer to make an arrest of "any person operating a motor vehicle on any way while under the influence of intoxicating liquor or drugs," or who otherwise violates any statute, etc.

5. Extent to which there were Proceedings under the Baby Volstead Act.

The "Baby Volstead Act," so called (St. 1923, c. 370), prohibiting the manufacture, transportation, importation and exportation of intoxicating liquor without a federal permit, was enacted by the Legislature of 1923 and approved by the Governor on May 9, 1923.

The operation of this act was suspended by the filing of referendum petitions, and it was submitted to the voters at the state election of November 4, 1924. On that date the act was approved by them and became effective December 4, 1924.

On November 4, 1930, the "Baby Volstead Act" was repealed by

the voters of the Commonwealth, and the repeal became effective on December 4, 1930.

During the six years of the life of this act it appears from such information as could be obtained from sixty-one of the seventy-three district courts, that proceedings were commenced in 4,670 cases alleging illegal manufacture, in which 3,750 defendants were found guilty; and proceedings were commenced in 3,303 cases alleging illegal transportation (including 10 for importation), in which 2,672 defendants were found guilty.

No court was able, however, to give exact data for the full six-year period.

An opinion has been rendered by the Attorney General to the Commissioner of Public Safety as to the powers of the state police under existing law with respect to arrests and seizure for violation of the state and federal law relating to the liquor traffic.

The repeal of the Baby Volstead Act leaves the state liquor law (G. L., c. 138) substantially as it was between January, 1921 (when the General Laws were codified) and December 4, 1924, the date when the Baby Volstead Act became effective.

6. Relative to Establishment of Schools for Training of Police Officers.

Some thought should be given to the improvement of the method of investigation and detection of crime so that the number of crimes which are unsolved and the number of criminals who avoid being apprehended and convicted will be reduced. Crime commissions have been appointed in various States to make a study of this matter. The opinion has been advanced that this condition is in no small measure due to the fact that the law-breaker makes use of the most modern methods, while the police officers have not had the benefit of any special training in the prevention and detection of crime.

I believe that this condition would be remedied materially if police officers from different cities and towns in the Commonwealth had the opportunity to attend a school established by the State, where special instruction in the matter of prevention and detection of crime might be had. I recommend legislation enabling members of the police force to receive this instruction.

7. Amendment of St. 1925, c. 330 (relating to Construction of the "Southern Artery"), extending Certain Privileges in the Land taken for Such Artery to Cities and Towns coursed by it.

St. 1925, c. 330, as amended, authorized the Department of Public Works to take land for certain ways, with title in the Commonwealth, though it provided they should be city ways. This is anomalous. It also provided

that the department should construct the ways. In the event that a city should desire to build a sidewalk, the walk must be built on state-owned land, unless the way be constructed to the full width of land taken. Other odd situations have resulted. Senate Bill No. 437, 1930, amending St. 1925, c. 330, § 7, was designed, in part, to harmonize original provisions of § 7 with facts disclosed by experience. I recommend consideration of Senate Bill No. 437, 1930.

8. A Commission to consider the Establishment of Domestic Relations or Family Courts.

I endorse the recommendation of the Commission on Child Welfare that a special commission be created to consider the establishment of courts of family or domestic relations. Such matters are now heard in different courts or in different sessions of the same court, according to their nature. They should be heard as much as possible by a single court. Measures in this regard should be considered by the Legislature only after special and careful study by a commission appointed for the purpose.

9. Restoration of Benefits Lost to Unmarried Widows and Dependent Children of Call Firemen through Operation of Certain Provisions of St. 1930, cc. 182 and 241.

St. 1930, c. 241, amending G. L., c. 32, § 89, after providing the amount of benefits payable to unmarried widows and to minor and incapacitated children, contains this limitation:

The total amount of all such annuities shall not exceed the annual rate of compensation received by such deceased person at the date of his death. . . .

Prior to the passage of chapter 241 and of chapter 182 of the Acts of 1930, which said chapter 241 amended, it was possible for the dependents of a call fireman, killed or dying from injuries received in the performance of his duty, to receive a payment of \$2,500 from the Commonwealth under G. L., c. 48, § 83, and to receive in addition an annuity not to exceed \$300 per year under G. L., c. 32, § 88, as amended, — provided that said section 88 had been accepted by the city or town from which the payment was to be made. These benefits were lost, however, on the passage of said chapters 182 and 241 because of certain provisions contained in sections 2 and 3 of said chapter 182. In their place were substituted the benefits of said chapter 241, with the limitation recited above, which were necessarily less, because the work of call firemen is part-time employment and the annual rate of compensation in a large number of cases does not exceed \$40 per year.

It would appear that this was done through inadvertence. I recommend that chapter 241 of the Acts of 1930 be amended so that the payment to the

dependents of a call fireman, and of a call policeman if likewise affected, killed under the circumstances recited therein, shall be the same as the payment to the dependents of a permanent fireman, or permanent policeman, of the same grade or performing the same duties.

10. Amendments to the State Constitution enabling Simplification Both in the Description of Measures and the Form of Questions presented to the Voters.

Art. XLVIII, The Initiative, II, "Initiative Petitions," § 3 (relating to the mode of originating initiative petitions), provides substantially as follows: — (1) that a petition for a proposed measure must be signed by ten qualified voters and (2) submitted to the Attorney General and (3) certified by him to be in proper form for submission to the people, and (4) filed with the Secretary, and (5) that the Attorney General shall prepare a description of the measure and (6) that the Secretary of the Commonwealth shall prepare blanks for the obtaining of the necessary twenty thousand signatures of qualified voters, and (7) that the Secretary *shall print at the top of each blank a description of the proposed measure as such description will appear on the ballot*. Similar procedure is required by Art. XLVII, The Referendum, III, "Referendum Petitions," § 3 (relating to mode of petitioning for the suspension of a law and a referendum thereon), and § 4 (relating to petitions for referendum on an emergency law or a law the suspension of which is not asked for). Both sections have a provision that, after such petitions have been signed by ten qualified voters and filed with the Secretary of the Commonwealth, *the Secretary shall provide blanks and shall print at the top of each blank a description of the proposed law as such description will appear on the ballot*.

In Art. XLVIII, General Provisions, III, "Form of Ballot," it is provided that each proposed amendment to the Constitution, and each law submitted to the people, shall be described on the ballot by a description, and that in the form of the question, in the case of an amendment to the Constitution or of a proposed law, the following words shall be used: —

Shall an amendment to the constitution (or law) (here insert description, and state, in distinctive type, whether approved or disapproved by the general court, and by what vote thereon) be approved?

General Provisions, IV, "Information for Voters," provides that the *Secretary of the Commonwealth* shall cause to be printed and *sent to each registered voter* the full text of every measure, a statement of the votes of the General Court on the measure, and *a description of the measure*. Thus it will appear that there must be a description of the proposed law (1) on the blanks for the securing of the signatures and (2) upon the

ballot and (3) in the information sent to the voters. The Constitution specifically requires that the description on the blanks and the description on the ballot shall be the same. The Supreme Judicial Court has stated that —

It would seem to be rational to infer that the purpose of the requirement that a description of the proposed law be printed on the initiative petition blanks, provided by the Secretary of the Commonwealth to be signed by the requisite twenty thousand qualified voters, is that such signers may have before their eyes and in their minds when deciding whether to sign the petition an impartial statement of the dominant and essential provisions of the proposed law so that thereby they may obtain an accurate conception of its main characteristics.

The Constitution requires, as stated therein and as interpreted by the Supreme Judicial Court, that "the description must be printed on the ballot." The nature of this description, as expressed by the Supreme Judicial Court, must be

a fair portrayal of the chief features of the proposed law in words of plain meaning, so that it can be understood by the persons entitled to vote. . . . It must be complete enough to convey an intelligible idea of the scope and import of the proposed law. It ought not to be clouded by undue detail, nor yet so abbreviated as not to be readily comprehensible. It ought to be free from any misleading tendency, whether of amplification, of omission, or of fallacy. It must contain no partisan coloring. It must in every particular be fair to the voter to the end that intelligent and enlightened judgment may be exercised by the ordinary person in deciding how to mark the ballot. The provisions of said art. 48 touching the description are mandatory and not simply directory. They are highly important. There must be compliance with them.

It therefore is seen that the description appearing on the ballot is that description printed on the blanks for obtaining the necessary twenty thousand signatures. Such description on the blanks must satisfy not only the Court's ruling of (1) "an impartial statement of the dominant and essential provisions of the proposed law so that thereby they (the signers when deciding whether to sign the petition) may obtain an accurate conception of its main characteristics", but also (to qualify as a description on the ballot) must be (2) "a fair portrayal of the chief features of the proposed law in words of plain meaning," (3) "complete enough to convey an intelligible idea of the scope and import of the proposed law," (4) "not clouded by undue detail, nor yet so abbreviated as not to be readily comprehensible," (5) "free from any misleading tendency, whether of amplification, of omission, or of fallacy," (6) containing "no partisan coloring," (7) "in every particular fair to the voter, to the end (8) that intelligent and enlightened judgment may be exercised by the ordinary person in deciding how to mark the ballot."

A legislator has before him the full context of a proposed law or a constitutional amendment for examination of those details upon which oftentimes

his vote as to the whole measure depends. I assume it was the purpose of the Constitutional Convention, in providing that such a description as set forth above should appear on the ballot, that the voter should likewise know the details upon which his exercise of judgment should depend, since by his vote he would himself be performing the functions of a legislator. But the mere fact that a voter is confronted in a booth with a recital of details prevents him from observation and consideration of their effect. The use in the description of any words, capable of misconstruction, or use of an abbreviated form, might give rise to legal proceedings testing whether the description complied in all respects with the requirements prescribed by the Supreme Judicial Court. In the event it should be found, in such proceedings, that the description had not so complied, the initiative and referendum measures, after all the labor of their petitioners, might fail. The use of terms identical with those in the text of a proposed law, while designed to meet the requirements and thus safeguard the law, has a deterring effect upon voters as to a complete reading of the description.

In the event that the proposed amendment or law is lengthy, the description, to comply with the requirements, cannot possibly be brief. For instance, a constitutional amendment appearing on the ballot this year, providing for at least five changes, necessitated not only recitation of the changes but a recitation of the conditions sought to be changed. Even then the voter was not fully enlightened thereby because the reasons for the changes and their practical effect could not be set forth, since these could not appear as a description. Furthermore, as Art. XLVIII, General Provisions, IV (providing that the Secretary of the Commonwealth circularize information to the voters), does not provide, in the case of constitutional amendments, for any statement similar to that provided in case of measures, no explanatory statement concerning an amendment could be set forth therein.

Again, initiative petitions for proposed measures filed for certification, often contain as many as seventy sections. It will at once be seen that a proposed measure of seventy sections, together with subsidiary provisions, cannot be described briefly, for, in doing so, some detail might be omitted, which, upon litigation contesting its validity, might be found to have been necessary.

Hence, change is necessary whereby a recitation of the general substance of a measure may be substituted for a detailed description.

A description by title might well suffice in some cases. Yet a title might be such that, though true, if the contents of the measure were made more fully known, the voter would not approve it. Again, in limiting a description to a title, it might be that all the purposes of the provisions could not be merged therein. Moreover, when petitioners present an initiative they attach a title. Such title may be "easily susceptible of being misunderstood." The Supreme Judicial Court has found one to have been so. The recitation of a title used by the petitioners may, as a matter of law, render

the description "defective." Consequently, if a description be by title, it should be one which the drafter of the description may formulate.

Voters receive information by circular of the full text of every proposed constitutional amendment and of every measure. Consequently, all that need appear on the ballot is a description sufficient to enable the voter to identify any particular amendment or measure. This may be accomplished by a title or by a description of its general substance.

The difficulty with this solution is that the *description printed on the ballot must be the same as that printed on the blanks* for securing the necessary twenty thousand signatures. At the time of securing these signatures, of course no information has been circularized. If a description by title or of general substance be permitted for description on the ballot, it might be that it would not satisfy the requirement prescribed for a description on the blanks, namely,

that signers may have before their eyes and in their minds when deciding whether to sign the petition an impartial statement of the dominant and essential provisions of the proposed law so that thereby they may obtain an accurate conception of its main characteristics.

Hence it appears that either the Constitution must be changed so that the description on the blanks need not be the same as on the ballot, or, if the same, that the description on the blanks may be likewise by title or by general substance.

Another cause of confusion is the form required by the Constitution in which the question must be put. The form is —

Shall an amendment to the constitution or law (here insert description, and whether approved or disapproved by the general court, and by what vote) be approved?

The question is suspended to the end. I believe it would be clearer if the form were:

Shall a law, approved (or disapproved) by the general court, and (by what vote), be approved, which is entitled or provides (here insert description or title or both).

I think that a description should not be limited to a title, nor to a description of its general substance, but should enable use of either or both, as the drafter of the description may deem sufficient or necessary.

11. Relating to Matters having to do with the Sale of Securities.

(a) INVESTIGATION OF SALE OF PAGE & SHAW STOCK.

As a result of numerous complaints received at this office in May, I conducted an extensive investigation into the methods employed by

certain officials of the company, promoters and salesmen, in the sale of the stock of the Page & Shaw Co., Inc., of Cambridge, Mass.

This investigation was conducted with the assistance of and in cooperation with the state police. As a result two of the principal participants in the stock-selling campaign were arrested at Springfield on May 21, 1930. I referred the evidence secured to District Attorney Robert T. Bushnell, for the Northern District, where the transactions had occurred, and most commendable vigorous prosecution quickly followed.

(b) FURTHER REGULATION OF THE SALES OF SECURITIES.

1. *That brokers and salesmen file bonds for indemnification against losses through fraud.*

The Department of Public Utilities grants permits to brokers to engage in the sale of stock. I recommend that a bond to the State, in an amount satisfactory to the department, be required, as well, for the indemnification of any purchaser of stock, in the event of any fraud in any sale of stock; and that no person shall sell any stock until he has filed such an indemnification bond.

2. *That representations as to stock include statements oral and written.*

G. L., c. 266, § 92, already has provisions prohibiting the making of certain statements tending to give a less or greater apparent value to shares, bonds and assets other than they possess. I recommend amendment further defining such statement as one either "oral or written," and defining an exaggerated statement, as one exaggerated "in whole or in part." This may be accomplished by inserting the words "oral or written" after the word "statement" in the third line; and the words "in whole or in part" after the word "exaggerated" in the eighth line.

3. *That inquirers of the Department of Public Utilities for information as to certain securities may receive such information without personal visit to the department.*

G. L., c. 110A, § 10 (a) provides that the Department of Public Utilities shall keep open to public inspection "all information received by the commission concerning securities found by it to be fraudulent." This information should be made applicable to inquiries by mail; facilities for rendering such service to the people should be provided.

4. *That those engaged in selling securities shall file further detailed information.*

G. L., c. 110A, § 4, sets forth the information requisite to be filed with the department. This information is limited; for instance, subsection (b) requires statement only as to the state or sovereign power under which the corporation is organized. Certified copy of the articles of incorporation, association and trust and every amendment when and as made should be required.

5. *That the act be amended so as to include "investment contracts."*

In G. L., c. 110A, § 2 (c), the definition of "security" does not include an "investment contract." Enterprises, known to be for investment purposes, but whose offerings are so phrased that in a strict legal sense non "securities" are sold, are thus excepted. For instance, there are "ranching service contracts," under which persons buy a certain number of animals and the ranch enterprise agrees to designate and set aside the animals for breeding purposes, with a charge of a certain per cent of the number of offspring as compensation for raising them.

6. *That the Department of Public Utilities be given specific authority to investigate complaints against persons who are not registered as well as those who are.*

Some uncertainty exists as to whether or not it is properly within the jurisdiction of the Department of Public Utilities to investigate complaints of violations of the Sale of Securities Act in cases where a person against whom a complaint is made is not a registered broker or salesman under the provisions of G. L., c. 110A, § 8.

I recommend that the Department of Public Utilities be given specific authority to investigate such cases and to move, though no complaints have been made, to ascertain whether unregistered persons ought to be registered. This may be done by amending G. L., c. 110A, § 11 (d):

7. *That stock of purchasers from brokers, upon which there has been only a part cash payment, may not be pledged by brokers other than as collateral for loans from banks, thus preventing possible release of such stock for stock market manipulation.*

It is my belief that certain practices in stock exchange transactions have resulted in as great losses to the people as swindles, and that these practices are permitted to continue by purchasers of stock, through ignorance of their existence and effect.

A purchaser of stock, through a broker, on part cash payment, receives a memorandum of the sale, describing the stock, price, amount, tax and commission. On such a memorandum is universally printed a notice. This notice recites the terms of understanding on which the actual purchase or sale is contemplated.

Among other terms are these:

that all securities carried to secure your account may be used by us when necessary for deliveries in the usual course of business or loaned or pledged by us either for the sum due thereon or for a greater sum and either separately or together with other securities, and that all such securities shall be considered by you as remaining subject to our control. All securities so carried may be bought or sold at public or private sale without notice when necessary for our protection. . . .

This language appears innocent. The purchaser naturally assumes that, as he has made but part payment on the stock, these terms are to enable the broker, by use of the stock as collateral, to borrow the balance

from a bank, rather than tie up his own capital. These very terms, as they do not stipulate that the stock may be pledged or loaned only to a bank, enable the perpetration, as I believe, of most nefarious transactions, to the great damage of the purchaser, of holders of like stock, and to the great harm of the people. I believe the recitation of these terms enables uses which are indefensible.

In order to push the price of any stock down, manipulators throw as much stock into the market as possible. They do this so they may buy it for themselves at low prices, and sell later on. Such manipulators search for available stock. The stock, for which the purchaser has made part payment, is available. The manipulators get the stock from the broker, held under the terms recited in the memorandum, pledge it to him as collateral for loan of the cash balance due. Incidentally, I believe it to be the general practice that the manipulator charges no interest on this loan. He is indeed well repaid by the favor of use of the stock. Meanwhile the purchaser continues to pay interest to the broker on his balance due. The manipulator dumps the stock into the market and reduces the market price of the stock. Thus, through uses permitted by the terms, so innocent in appearance, the purchaser is undone, all the holders of similar stock suffer reverses through the fall in price; business conditions are disturbed through the havoc caused, and the people suffer loss of employment on construction work of enterprises handicapped or wrecked through loss of capital. The irony of it all is that the purchaser's own stock has been used to lessen its value, and that, by his own assent, he has enabled such use.

It may be that the dumping of stock on the market may serve to check an excessive inflation of prices. When stocks are on the rise I do not believe the operation has material effect. It appears to be done mostly when stocks are on the decline. Whether the operation itself be justified as a natural incident to supply and demand, the purpose of the manipulators, in coralling the stock from the brokers, is selfish greed. But for the terms, the use of which enables this operation, these depredations would be greatly handicapped. It is high time, and particularly now, that the people show whether they or these manipulators are masters.

I recommend legislation prohibiting this practice; that no member or firm in the exchanges, nor any one in their behalf, shall be permitted to loan their customers' stock other than as bank collateral; that the notice on the memorandum shall expressly so stipulate; that the Department of Public Utilities may deny all privileges to brokers who do so; that the customer, in case his stock is loaned, other than as bank collateral, may, in event of loss to him through loan other than as bank collateral, recover such loss.

8. *That certain provisions for regulating "Investment Trusts" be considered.*

(a) That "INVESTMENT TRUST" shall include investment trusts of the

fixed, semi-fixed, general management, and restricted management types, trading companies, management companies, holding companies, and finance companies, provided it shall appear —

(1) They have a portfolio of their own and invest and reinvest their own funds as part of their business; and

(2) Issue shares in themselves for sale to the public, in “warrant”, “syndicate”, “intermediate” form or “free” shares, which are transferable upon issuance or at a future time.

(b) That investment trusts with a capital structure of \$1,000,000 or over, and with subscribers over 100 in number shall be incorporated.

(c) That such trusts shall not trade in their own shares.

(d) That such trusts shall purchase their own shares of original issuance only for the purpose of retirement and then at not more than asset value.

(e) That the operating management consist of not less than five trustees or directors.

(f) That there shall be no ownership control of investment trusts by other trusts or corporations or persons subservient to other trusts or corporations.

(g) That the managing of the investment trust’s portfolio (by contract or otherwise) shall not be by persons outside the trust organization.

(h) That there shall not be payment of dividends in cash or scrip out of capital or return of capital.

(i) That there shall not be payment of dividends when insolvent at the time of computation for such payment.

(j) That deviation by officers, trustees and/or directors, from the restrictions and limitations set out in the declaration of trust, certificate of incorporation or by-laws, causing financial loss to the shareholders, shall be subject to penalty as well as civil liability.

Conclusion.

I express my appreciation to the Assistant Attorneys General for their faithful and able service, to all others associated with me in the work of the department for their loyalty and efficiency, and to the district attorneys, the state police and police of the cities and towns for their splendid co-operation.

Respectfully submitted,

JOSEPH E. WARNER,
Attorney General.

DETAILS.**1. Disposition of indictments pending Nov. 30, 1929:****Eastern District** (in charge of District Attorney William G. Clark).

George Breton.

Indicted in Essex County, June, 1929, for the murder of Caroline Breton, at Methuen, on June 7, 1929; arraigned June 17, 1929, and pleaded not guilty; committed to the Danvers State Hospital for observation, Oct. 7, 1929; trial January, 1930, verdict of not guilty by reason of insanity; thereupon committed to Bridgewater State Hospital for life.

Northern District (Middlesex County cases: in charge of District Attorney Robert T. Bushnell).

Gerard Capello, *alias*.

Indicted December, 1929, for the murder of Edward C. Ross, at Cambridge, on Sept. 29, 1925; arraigned Jan. 27, 1930, and pleaded not guilty; *nolle prosequi* May 19, 1930.

Northwestern District (in charge of District Attorney Charles Fairhurst).

Charles Macules, *alias*.

Indicted in Hampshire County, February, 1929, for the murder of George Chepules, at Amherst, on Dec. 20, 1928; arraigned Feb. 25, 1929, and pleaded not guilty; June 19, 1930, committed to Bridgewater State Hospital.

Southeastern District (in charge of District Attorney Winfield M. Wilbar).

Christopher E. Cullen.

Indicted in Plymouth County, February, 1929, for the murder of Cora J. Cullen, at Hingham, on Jan. 25, 1929; arraigned March 14, 1929, and pleaded not guilty; Feb. 27, 1930, adjudged insane and committed to Bridgewater State Hospital.

Southern District (in charge of District Attorney William C. Crossley).

Charles F. Lewis.

Indicted in Bristol County, February, 1927, for the murder of Charles Walker; arraigned June 18, 1930, and pleaded not guilty; adjudged insane, and thereupon committed to the Bridgewater State Hospital for life.

Suffolk District (Suffolk County cases: in charge of District Attorney William J. Foley).

Rocco Cassaro, and Carmelo Garufo as accessory before the fact.

Indicted November, 1929, for the murder of Salvatore Alabiso on Oct. 27, 1929; Rocco Cassaro arraigned Jan. 2, 1930, and pleaded not guilty; trial January, 1930; verdict of not guilty as to Cassaro; Carmelo Garufo arraigned Jan. 21, 1930, and pleaded not guilty; Jan. 30, 1930, motion for directed verdict of not guilty allowed as to Garufo.

Gangi Cero.

Indicted June, 1927, for the murder of Joseph Fantasia on June 11, 1927; arraigned July 6, 1927, and pleaded not guilty; trial November, 1927; verdict of guilty of murder in the first degree; motion for new trial and assignments of error, and claim of appeal and assignments of error denied; thereupon sentenced to death by electrocution during the week beginning Nov. 4, 1928; respites of execution of sentence to Dec. 9, 1928, Jan. 8, 1929, Feb. 7, 1929, and April 8, 1929, granted by the Governor and Council; motion for new trial on the ground of newly discovered evidence allowed March 22, 1929; second trial September, 1930; verdict of not guilty.

James F. Doyle.

Indicted March, 1929, for the murder of Mary F. Doyle on Feb. 11, 1929; adjudged insane and committed to the Bridgewater State Hospital.

2. Indictments found and dispositions since Nov. 30, 1929:

Eastern District (in charge of District Attorney William G. Clark).

Paul Smith, George A. Leet and Earl R. Baker.

Indicted in Essex County, January, 1930, for the murder of William J. Fendall, at Saugus, on Jan. 2, 1930; Paul Smith arraigned Jan. 20, 1930, and George A. Leet and Earl R. Baker arraigned Jan. 27, 1930, and each pleaded not guilty; March 12, 1930, Paul Smith and Earl R. Baker retracted former pleas and pleaded guilty to murder in the second degree; pleas accepted; sentenced thereupon to State Prison for life; April 8, 1930, *nolle prosequi* as to George A. Leet.

Northern District (Middlesex County cases: in charge of District Attorney Robert T. Bushnell).

Carmine Cavaretta.

Indicted February, 1930, for the murder of Antonio Gallo, at Newton, on Jan. 22, 1930; arraigned Feb. 6, 1930, and pleaded not guilty; trial March, 1930, during which he retracted former plea and pleaded guilty to manslaughter, which was accepted; thereupon sentenced to State Prison for not less than eighteen years nor more than twenty years.

Nick Mazzo.

Indicted June, 1930, for the murder of Carmen Damelio, at Cambridge, on June 20, 1930; arraigned July 3, 1930, and pleaded not guilty; later retracted former plea and pleaded guilty to manslaughter; plea accepted; sentenced thereupon to State Prison for not less than seven years nor more than ten years.

Charles F. Nickerson.

Indicted September, 1930, for the murder of Etta Townsend, at Reading, on June 16, 1930; arraigned Sept. 8, 1930, and pleaded not guilty; Nov. 14, 1930, retracted former plea and pleaded guilty to manslaughter; plea accepted; sentenced thereupon to State Prison for not less than three years nor more than five years.

Southeastern District (in charge of District Attorney Winfield M. Wilbar).

Manuel Fernandes.

Indicted in Plymouth County, February, 1930, for the murder of Julia Pina, at Wareham, on Oct. 14, 1929; arraigned Feb. 12, 1930, and pleaded guilty to murder in the second degree; plea accepted; sentenced thereupon to State Prison for life.

George Nardi.

Indicted in Plymouth County, February, 1930, for the murder of Donato Nardi, at Brockton, on Jan. 14, 1930; arraigned June 11, 1930, and pleaded guilty to manslaughter; plea accepted; sentenced thereupon to one year in the house of correction.

Southern District (in charge of District Attorney William C. Crossley).

Albert LaPlante.

Indicted in Bristol County, June, 1930, for the murder of Anna N. LaPlante, at Dartmouth, on May 24, 1930; arraigned June 25, 1930, and pleaded not guilty; found not guilty by reason of insanity, and on June 25, 1930, committed to the Bridgewater State Hospital for life.

Suffolk District (Suffolk County cases: in charge of District Attorney William J. Foley).

Herbert F. Joyce.

Indicted January, 1930, for the murder of Margaret Joyce on Dec. 16, 1929; arraigned Feb. 13, 1930, and pleaded not guilty; Feb. 25, 1930, retracted former plea and pleaded guilty to murder in the second degree; plea accepted; sentenced thereupon to State Prison for life.

Louis Kratter.

Indicted December, 1929, for the murder of Louis Gorin on Nov. 5, 1929; adjudged insane and committed to the Bridgewater State Hospital.

Garabad Minasian.

Indicted August, 1930, for the murder of Lucy Minasian on Aug. 3, 1930; adjudged insane and committed to Bridgewater State Hospital.

Moe Newman.

Indicted January, 1930, for the murder of Samuel Reinstein on Sept. 13, 1929; arraigned Feb. 18, 1930, and pleaded not guilty; trial November, 1930; verdict of not guilty.

James Threadgill.

Indicted February, 1930, for the murder of James J. Troy on Jan. 13, 1930; arraigned Feb. 7, 1930, and pleaded not guilty; trial March, 1930; verdict of guilty of murder in the second degree; thereupon sentenced to State Prison for life.

3. Pending indictments and status:

Eastern District (in charge of District Attorney William G. Clark).

Bernardo S. Thompson.

Indicted in Essex County, September, 1930, for the murder of Katherine E. Wight, at Saugus, on July 16, 1930; arraigned Sept. 22, 1930, and pleaded not guilty; Sept. 22, 1930, committed to Danvers State Hospital for observation.

Middle District (in charge of District Attorney Edwin G. Norman).

Leon Trudeau.

Indicted in Worcester County, May, 1930, for the murder of Cecelia Trudeau, at Webster, on Feb. 22, 1930; arraigned May 21, 1930, and pleaded not guilty; trial June, 1930; verdict of guilty of murder in the second degree; claim of appeal pending.

Northern District (Middlesex County cases: in charge of District Attorney Robert T. Bushnell).

Joseph Belenski, *alias*.

Indicted September, 1930, for the murder of Wincenty Stefanowicz, *alias*, at Stow, on May 25, 1930; arraigned Sept. 8, 1930, and pleaded not guilty; trial November, 1930; verdict of guilty of murder in the first degree; claim of appeal pending.

John Furtado.

Indicted November, 1930, for the murder of Antonia Furtado, at Cambridge, on Oct. 19, 1930; arraigned Nov. 6, 1930, and pleaded not guilty; trial December, 1930; verdict of guilty of murder in the first degree; motion for new trial and claim of appeal pending.

Joaquim Pita Soaris.

Indicted March, 1930, for the murder of Angelina Rodrigues, at Lowell, on March 2, 1930; arraigned March 26, 1930, and pleaded not guilty; trial May, 1930; verdict of guilty of murder in the first degree; motion for new trial denied; claim of appeal pending.

Southeastern District (in charge of District Attorney Winfield M. Wilbar).

Wallace Allan Graham.

Indicted in Norfolk County, December, 1928, for the murder of Janet Graham, at Quincy, on Sept. 9, 1928; arraigned April 16, 1929, and pleaded not guilty; committed to the Bridgewater State Hospital for observation, April 16, 1929.

Thomas G. Healey.

Indicted in Norfolk County, September, 1930, for the murder of Joseph P. O'Brien, at Brookline, on Aug. 3, 1930; arraigned Sept. 15, 1930, and pleaded not guilty; released on bail Dec. 16, 1930.

Suffolk District (Suffolk County cases: in charge of District Attorney William J. Foley).

Samuel Gallo.

Indicted January, 1929, for the murder of Joseph Fantasia on June 11, 1927; arraigned Jan. 11, 1929, and pleaded not guilty; trial February, 1929; verdict of guilty of murder in the first degree; motion for new trial allowed March 22, 1929; second trial September, 1930; verdict of guilty of murder in the first degree.

Leong Sang, *alias*, and William Fung, and Ung Hong Yun, *alias*, as accessory before the fact.

Indicted August, 1929, for the murder of Yee Toon Wah on Aug. 5, 1929; Sang arraigned Sept. 5, 1929, Fung on March 28, 1930, and Yun on Aug. 12, 1929, and each pleaded not guilty; trial April, 1930; verdict of guilty of murder in the first degree as to Sang, and verdicts of not guilty as to Fung and Yun; Sang's motion for new trial and claim of appeal denied.

OPINIONS.

Small Loans — Licenses — Mode of Doing Business.

It is a question of fact for the determination of the Commissioner of Banks whether a corporation, however organized or operating, engages in the business of making small loans, as described in the applicable statute. If it does so engage in such business, it must be licensed.

DEC. 16, 1929.

Hon. ROY A. HOVEY, *Commissioner of Banks.*

DEAR SIR: — You have asked my opinion as to whether the business of making loans in the amount of three hundred dollars or less, as carried on in the following manner, requires a license under G. L., c. 140, § 96. You have described the manner in which the business is done as follows: —

“A corporation contemplates the issue of ten thousand shares of preferred stock, par value \$10.00, and ten thousand shares of common stock, no par value, to be offered for public sale at \$20.00 per unit of two preferred shares and one common share. The plan has secured the tentative approval of the Department of Public Utilities, Sale of Securities Division. The purpose of the corporation is to lend money at the maximum legal rate of interest for the specialized purpose of purchasing fuel for home consumption. Repayment is to be made in weekly installments. The mechanics of the loan will be in the form of an order of the corporation upon the person selling the fuel, to whom payment will be made directly.”

I am of the opinion that the mode in which a corporation is organized, or the particular purpose for which its loans of three hundred dollars or less are to be used, or the fact that the money which is borrowed is by agreement with the borrower paid to a third person for the former's benefit, as described by you in your letter, is immaterial to a determination of whether or not such corporation is required to be licensed under said section 96. Irrespective of the foregoing facts relative to the mode and manner in which a corporation carries on its operations, if, as a matter of fact, it directly or indirectly engages “in the business of making loans of three hundred dollars or less, and if the amount to be paid on any such loan for interest and expenses exceeds in the aggregate an amount equivalent to twelve per cent per annum upon the sum loaned,” as set forth in said section 96, it is required to be licensed.

If you determine, as a matter of fact, that a corporation engages in the business described in section 96, as above quoted, it is your duty to see that such a corporation is licensed, or that the proper authorities are requested to institute a prosecution against it under the provisions of said section 96.

Very truly yours,

JOSEPH F. WARNER, *Attorney General.*

Civil Service — Superintendent of Construction in the Department of School Buildings in Boston — Deputy Superintendents.

The position of superintendent of construction in the department of school buildings in Boston is not within the provisions of the civil service laws.

The positions of deputy superintendents in said department are within the provisions of the civil service laws.

DEC. 18, 1929.

Hon. ELLIOT H. GOODWIN, *Commissioner of Civil Service.*

DEAR SIR: — You have requested my opinion upon the following matter now before you for consideration: —

“I respectfully request your official opinion as to whether or not the position of superintendent of construction, created by St. 1929, c. 351, § 2, is under civil service.”

The statute to which you refer, St. 1929, c. 351, in its pertinent parts reads as follows: —

“The department of school buildings of the city of Boston is hereby established and shall be under the charge of a superintendent of construction who shall be elected by the board of commissioners and shall serve at the pleasure of said board. His salary shall be established by said board of commissioners, with the approval of the school committee, but shall not exceed twelve thousand dollars per annum. He shall make a written report to the mayor, to the school committee and to the board of commissioners annually or oftener as the mayor, or the school committee or the board of commissioners may require and in such manner and detail as may be required.”

You have called my attention to the fact that in section 1 of said statute, with relation to the member of the board of commissioners of school buildings who is to be appointed by the mayor, it is specifically stated that he shall be so appointed “without approval by the civil service commissioners.” It does not seem to me that the existence in the statute of this provision, with relation to the appointment of a commissioner who is to serve for a term of years fixed by the act, is significant as to the legislative intent in relation to the provisions of section 2 as to the position of the superintendent of construction, who is to be elected by the board of commissioners and “shall serve at the pleasure of said board.” As no power of removal of the said commissioner before the expiration of his statutory term was vested by the statute in any one, the same considerations would not necessarily apply to such commissioner with regard to civil service as might apply to a superintendent whose removal by the appointing body was particularly authorized.

It has been held by several of my predecessors in office that, where power to remove a State employee or official is specifically vested in an appointing body, such official is not within the provisions of the civil service law and the regulations made thereunder.

In considering the provisions of the act creating the South Essex Sewerage Board, concerning employees, St. 1925, c. 339, § 3, which reads, in part, as follows: —

“Said board shall from time to time appoint or employ such engineers, experts, agents, officers, clerks and other employees as it may deem necessary, shall determine their duties and compensation, which shall be paid by the district, and may remove them at pleasure.” —

a former Attorney General said (VII Op. Atty. Gen. 719, 720): —

“The fact that the statute gives to the board the power to remove the various employees named therein at its pleasure indicates that it was not the intention of the Legislature that the board or its employees should be subject to the requirements of the laws relative to civil service.”

In considering the status of certain matrons at the house of detention in the city of Boston, as affected by the civil service law, the applicable statute being St. 1887, c. 234, § 3, wherein it was provided, among other things, that such matrons "shall be appointed to hold office until removal, and . . . may be removed at any time by said board by written order stating the cause of removal," another of my predecessors in office said (VI Op. Atty. Gen. 152, 155):—

"The strongest indication, however, that it was not intended that these positions should be within the classified service is contained in the provision that the appointees 'shall be appointed to hold office until removal, and they may be removed at any time by said board by written order stating the cause of removal.' If they were appointed under civil service they could not be removed at any time by the appointing board merely upon a written order stating the cause of removal.

For the foregoing reasons I am of the opinion that the act of 1887, so far as it relates to the chief matron and assistant chief matron, falls within the exceptions to the general rule, which requires that a special act shall be held to be subject to the provisions of a general law previously enacted, and that these two positions are therefore not within the classified service."

Again, in an opinion relative to the position of an assistant register of probate, appointed under St. 1921, c. 42, the then Attorney General said (VI Op. Atty. Gen. 334, 335):—

"An equally strong indication that the position of assistant register is not within the civil service rules is contained in the provisions that, after being appointed by the judges of probate, an assistant register shall hold office for three years unless sooner removed by the judges. If assistant registers were under civil service, they could not be removed at any time during tenure of office by the appointing power, but would be subject to removal only in compliance with the provisions of G. L., c. 31, § 43, which is the section containing the provisions as to the removal of persons in the classified public service of the Commonwealth."

And again, in the same opinion (VI Op. Atty. Gen. 334), with relation to the position of clerk in the Probate Court for Suffolk County, as to which the provisions of the applicable statute, G. L., c. 217, § 28, were as follows:—

"The register for Suffolk county may, subject to the approval of the judges of probate for said county, appoint a clerk and may remove him at pleasure."—

it was said (p. 336):—

"In the case of the Suffolk clerk, he may be removed at pleasure, and this, in my opinion, takes him out of the civil service classification."

The words of the instant statute, that the said superintendent of construction "shall serve at the pleasure of the board," indicate an intention on the part of the Legislature to vest in the appointing power authority to remove an incumbent of the instant office in the same way as is indicated by the provisions of the statutes passed upon by my predecessors in office, with whose conclusion I agree.

I am not unmindful of the language used in the opinion of the Supreme Judicial Court in *Robertson v. Coughlin*, 196 Mass. 539. In that opinion the court was considering a situation which had actually been created by a particular mode of exercising the power of removal at pleasure, adopted

by a certain board. The court does not say in its opinion that another mode of exercising the power of removal at pleasure might not have been adopted by the board having the power of appointment and removal, and it cannot be assumed that the commissioners appointed by the instant statute will use their power in the precise mode which was adopted by the board in *Robertson v. Coughlin*, *supra*. It cannot be said in advance of action by the board of commissioners of school buildings that the words "shall serve at the pleasure of the board" do not vest such power of removal in that body as to place the position of superintendent of construction outside the action of the civil service laws or regulations.

As to the positions of deputy superintendents, provided for in St. 1929, c. 351, § 4, there do not appear to be any provisions of the instant statute which render the civil service law and the rules made thereunder inapplicable to them.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Metropolitan Transit District — Powers of Trustees to borrow Money.

The trustees of the Metropolitan Transit District are authorized to borrow money temporarily, and to issue notes for the same, for the purpose of providing funds for the payment of certain expenses when no other funds are available for the purpose.

DEC. 30, 1929.

Trustees of the Metropolitan Transit District.

GENTLEMEN: — You request my opinion as to whether you are authorized, under St. 1929, c. 383, temporarily to borrow money, and issue notes of the district therefor, in order to provide funds for certain current expenses, such as office rental, stenographic service, etc., there being no funds available to meet such expenses.

By section 1 of the act the district is given the power "of contracting and doing other necessary acts relative to its property and affairs." Section 2 provides that "the affairs of the district shall be managed by a board of five trustees;" and that "the trustees may from time to time appoint and at pleasure remove a clerk, treasurer and such agents and employees for the district as they may deem necessary, and may determine their duties and their compensation, which shall be paid by the district; shall cause at all times accurate accounts to be kept of all expenditures of the funds of the district; and shall make an annual report, containing an abstract of such accounts, to the general court and to the metropolitan transit council. . . . Except as herein otherwise provided, they shall have full authority to represent the district, to have the care of its property and the management of its business and affairs, . . ."

It may be assumed that the expenses to which you have reference are deemed by the trustees to be necessary for the proper management of the affairs of the district.

There being no funds now available for these expenses, the trustees have, in my opinion, power to issue temporary notes of the district for the purpose of providing such funds. Section 10 of the act contains the following paragraph: —

"The trustees, in behalf of the district, may temporarily borrow money and issue notes of the district therefor in anticipation of the issue of bonds, or of receipts from taxation, or of income to be received, or to provide for

the payment of any obligations when due, for which funds are not available. No purchaser of such bonds or lender upon such notes shall be bound to see to the application of the money paid or loaned."

The expenses to which you refer, when incurred, will become obligations for the payment of which no funds will, unless now borrowed, be available. In my opinion, the words of section 10, above quoted, are to be construed as authorizing the issuance of temporary notes for the purpose of providing such funds.

The money with which to pay the notes may, in my opinion, be obtained by the trustees through the means set forth in section 12 of the act, which provides that on or before June 15th of each year the trustees shall certify to the State Treasurer the estimated amount required for the current expenses of the district, "and shall also certify the amount required to meet any lawful obligations of the district for which payment is not otherwise provided"; and that the State Treasurer shall apportion such amounts among the cities and towns of the district, collect such amounts in the same manner as other State taxes assessed upon said cities and towns, and pay over the amounts so collected to the district.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Great Pond — Ice Company — Exclusion of Public.

An ice company, by marking out certain areas for ice cutting on a great pond of twenty acres, may not exclude the public from the use of such pond or such areas for fishing or skating.

JAN. 3, 1930.

HON. WILLIAM A. L. BAZELEY, *Commissioner of Conservation*.

DEAR SIR: — You have asked my opinion upon the following question: —

"On a natural great pond of twenty acres and upwards, can an ice company mark off an area (after the ice has formed) and thereafter exclude the public, such as fishermen and skaters, from going on said area?"

The subject of great ponds, and public rights therein and access thereto, was considered at great length in an opinion rendered to you by one of my predecessors in office. See VII Op. Atty. Gen. 262.

There has never been any judicial decision with relation to the precise question you ask, but, without entering upon an exhaustive discussion of the matter, I am of the opinion that neither an ice company nor anyone else may mark off a portion of ice which is formed upon a great pond of twenty acres and upwards and thereafter exclude the public, such as fishermen and skaters, from such area, in the absence of specific legislation or ancient grant.

As was said in the opinion of my predecessor before referred to, in connection with great ponds: —

"Fishing, fowling, boating, bathing, skating . . . and the cutting and taking of ice, are public rights which are free to all persons so far as they do not interfere with the reasonable use of the ponds by others or with the public right, except in cases where the Legislature has otherwise directed."

It does not appear to me that the rights of an ice company which has marked out certain areas of ice, and done nothing else, are superior to those

of other members of the general public using the pond for fishing or skating, and I therefore do not think that such uses by the general public may be interfered with by such an ice company.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Board of Dental Examiners — License — Suspension.

The Board of Dental Examiners has authority to suspend the license of a dentist who violates any of the provisions of G. L., c. 112, § 44.

JAN. 4, 1930.

Mr. WILLIAM F. CRAIG, *Director of Registration*.

DEAR SIR:— You request my opinion as to whether the Board of Dental Examiners has the right, under G. L., c. 112, § 61, to suspend the authority to practice dentistry of one who has failed to comply with G. L., c. 112, § 44, as amended.

Said section 61 empowers the Board to suspend a license or authority to practice if it appears to the Board that the holder of such certificate, registration, license or authority "is insane, or is guilty of deceit, malpractice, gross misconduct in the practice of his profession, or of any offence against the laws of the commonwealth relating thereto."

Section 44, as amended, reads as follows:—

"Every registered dentist when he begins practice, either by himself or associated with or in the employ of another, shall forthwith notify the board of his office address or addresses, and every registered dentist practicing as aforesaid shall annually, before April first, pay to the board a license fee of two dollars. Every registered dentist shall also promptly notify the board of any change in his office address or addresses and shall furnish such other information as the board may require. The board shall publish annually complete lists of the names and office addresses of all dentists registered and practicing in the commonwealth, arranged alphabetically by name and also by the towns where their offices are situated. Every registered dentist shall exhibit his full name in plain readable letters in each office or room where his business is transacted."

The provisions of section 44 relate to the practice of the profession of dentistry; and by section 52 a penalty of fine or imprisonment is imposed for violation of any of those provisions. Violation of any of the provisions of section 44 is accordingly an offence against the laws of the Commonwealth relating to the practice of the profession, and therefore the Board has authority to act under the terms of section 61.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Pension — Veteran — Soldiers' Home.

A veteran who is a member of the Soldiers' Home and also in its service may receive, upon retirement from such service, a pension based solely on his weekly wage.

JAN. 7, 1930.

Trustees of The Soldiers' Home in Massachusetts.

GENTLEMEN:— You have asked my opinion whether the provisions of St. 1920, c. 204, are to be so construed as to entitle a member of The

Soldiers' Home in Massachusetts to a retirement pension, as provided for in said statute, when said member also worked at the Home on a weekly salary.

I assume from your communication that the person seeking a pension is a veteran of the Civil War, although you do not so state. If so, he is otherwise qualified to be retired on a pension, provided that the fact that he was a member of the Home and received free board and lodging does not preclude him.

St. 1920, c. 204, now G. L., c. 32, § 51, provides as follows: —

"A veteran of the civil war who has been in the service of the soldiers' home in Massachusetts for fifteen years, if incapacitated for active service, may be retired by the trustees of the home, with the consent of the governor and council, at one half the average rate of compensation paid to him during the two years immediately preceding his retirement."

This section is a part of the system of pensions paid to veterans of the Civil War, Spanish War and World War who have been in the service of the Commonwealth or Soldiers' Home for a certain length of time and who have become incapacitated for further service. (See G. L., c. 32, §§ 49-60.)

The statute specifically states that a veteran who has been in the service of the Home a certain time and has become incapacitated for further service may be retired upon a pension, and makes no exception militating against a veteran in the service of the Home who is also a member of the Home and receiving free board and lodging. If the Legislature had meant such veterans to have been excluded from the veterans' pension it would have been an easy matter to have said so in the statute.

Presumably, as a member of the Home the veteran was entitled to his free board, lodging and support. See act of incorporation, St. 1877, c. 218, where it is stated that —

"Said trustees may receive, hold, manage . . . for the purpose of maintaining in this Commonwealth a home for deserving soldiers and sailors and such members of their families as said trustees may deem proper, and under such conditions and regulations as said trustees may from time to time prescribe."

See also Resolves of 1883, c. 27.

The fact that the veteran, a member of the Home, was employed by the trustees in the capacity of janitor at a weekly wage for over fifteen years brings him squarely within the purview of the statute, and the trustees may retire him on a pension, calculated on the basis set forth in St. 1920, c. 204.

Such compensation is to be based solely on the weekly wage paid in cash, and must not take into account the value of his board and lodging. St. 1922, c. 341, § 2, allowing additional compensation based on the value of board and lodging provided to the veteran, does not apply to pensions paid under G. L., c. 32, §§ 49-60, which includes St. 1920, c. 204. See VII Op. Atty. Gen. 646; VI Op. Atty. Gen. 571; V Op. Atty. Gen. 634; and III Op. Atty. Gen. 128 and 141.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Department of Public Safety — Boiler Inspection — Certificate.

A certificate as a boiler inspector does not authorize the holder to inspect for any company other than the one requesting the issuance of such certificate, although another certificate may be issued upon the request of a second company; but no certificate may issue upon a request by two companies jointly.

JAN. 8, 1930.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety.*

DEAR SIR: — You request my opinion (1) as to whether a certificate of competency as a boiler inspector, issued in connection with a request by one insurance company, authorizes the holder to inspect for another company also; (2) whether the Department may issue two certificates to the same person upon separate applications made in connection with two different companies; and (3) whether the Department may issue a certificate upon a single application to inspect for two different companies who join in the request accompanying the application.

I answer your first question in the negative. The statute, G. L., c. 146, § 62, provides for "a certificate of competency to inspect steam boilers for the company which requested the examination." Such a certificate cannot authorize inspection for some other company. Section 15 forbids acting as an inspector for an insurance company without a certificate of competency "under section sixty-two."

As to your second question, I see no reason why an applicant is disqualified from receiving a certificate to inspect for a given company because he has previously obtained a certificate to inspect for another company. The Department, in my opinion, has authority to issue more than one certificate to the same man.

I answer your third question in the negative. Said section 62 further provides: "The certificate shall remain in force during his employment by the company unless sooner revoked." Although words in the singular number may be construed as plural, yet such a construction here would lead to complications which I think were not intended.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Department of Education — Contract — Employment of Labor.

A contract between the Department of Education and Harvard College for the sale of steam and electricity need not contain provisions of G. L., c. 149, § 34, with relation to the employment of labor.

JAN. 8, 1930.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You have requested my opinion as to whether or not the provision in regard to the employment of labor, referred to in G. L., c. 149, § 34, should be included in a proposed contract to be made between the Department of Education and the Trustees of Harvard College for the purchase by the former of steam and electricity from the power plant of the Harvard Medical School, for use in the new building of the Massachusetts School of Art.

G. L., c. 149, § 34, reads as follows: —

"Every contract, except for the purchase of material or supplies, to which the commonwealth, or any county or any town which has accepted section twenty of chapter one hundred and six of the Revised Laws, is a party, involving the employment of laborers, workmen or mechanics, shall contain a stipulation that no laborer, workman or mechanic working within the commonwealth, in the employ of the contractor, sub-contractor or other person doing or contracting to do the whole or a part of the work contemplated by the contract, shall be requested or required to work more than eight hours in any one day, and every such contract not containing this stipulation shall be null and void."

It has previously been held by one of my predecessors in office, in an opinion rendered to the Massachusetts District Police on March 25, 1912 (not published), in which opinion I concur, that a contract by a company to supply gas to a political subdivision was a contract for material and supplies within the provisions of the then applicable statute. See also III Op. Atty. Gen. 73.

I am of the opinion that the instant contract, which is one for the sale of steam and electricity, is likewise such a contract for material or supplies, and that under the foregoing terms of said G. L., c. 149, § 34, it is not required to contain the provisions set forth in said statute relative to the conditions of labor of those employed under its terms.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Towns — Appropriations — Mosquito Control.

Since the passage of St. 1929, c. 288, towns have authority, both under such statute and under the powers conferred upon local boards of health prior thereto, to appropriate money for mosquito control.

JAN. 8, 1930.

Dr. ARTHUR W. GILBERT, *Commissioner of Agriculture*.

DEAR SIR:— You have asked my opinion as to whether towns may appropriate money, for the purpose of eradicating mosquitoes, in any other way than that outlined in St. 1929, c. 288. That statute, amending G. L., c. 252, provides for the eradication of mosquitoes under the direction of the reclamation board; and also provides that cities and towns may initiate the proceedings therein described, where it appears that the public health, safety or convenience will be promoted, and may appropriate money for such purposes (§ 2). St. 1929, c. 288, also amends, by section 6 thereof, G. L., c. 40, § 5, by providing that towns may appropriate money "for the improvement of low lands and swamps and the eradication of mosquitoes, as provided in chapter two hundred and fifty-two."

You state that towns have in the past appropriated money for mosquito control, to be expended by the local boards of health. Presumably, such expenditure has been made under G. L., c. 111, § 132, which reads as follows:—

"Land which is wet, rotten or spongy, or covered with stagnant water, so as to be offensive to residents in its vicinity or injurious to health, shall be deemed a nuisance, which the board of health of the town where it lies, upon petition and hearing, may abate in the manner provided in the seven

following sections; but if the expense of abatement will exceed two thousand dollars, such abatement shall not be made without a previous appropriation therefor."

Perhaps, also, the money has been expended under other applicable statutory provisions.

In my opinion, whatever powers the towns had to act through their local boards of health prior to the enactment of St. 1929, c. 288, they still have. Said act of 1929 has no effect other than to give a town a right to proceed under G. L., c. 252, as amended; it in no way affects existing powers of local boards of health as set forth in G. L., c. 111, § 132, or in any other sections.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Corrupt Practices — Political Committee — Initiative Petition.

The term "political committee" can be said to apply to a committee organized to favor or oppose an initiative measure only after such measure has passed through all the stages precedent to its being laid before the voters.

JAN. 13, 1930.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR:— You have requested my opinion on the two following matters:—

"*First*: Is an organization formed for, or carrying on, activities to promote the success or defeat of a question which might later be submitted to the voters as the result of an initiative petition, pursuant to Mass. Const. Amend. XLVIII, considered a political committee under G. L., c. 50, § 1?

"*Second*: If the reply to the first question is in the affirmative, when would such organization begin to function as a committee, and when should it file the names of its officers, as provided in G. L., c. 55, § 4?"

The words "political committee" are defined in G. L., c. 50, § 1, as amended by St. 1928, c. 212, § 1, as follows:—

"*'Political committee' shall apply only to a committee elected as provided in chapter fifty-two, except that in chapter fifty-five it shall also apply, subject to the exception contained in section thirty-eight thereof, to every other committee or combination of five or more voters of the commonwealth who shall aid or promote the success or defeat of a political party or principle in a public election or shall favor or oppose the adoption or rejection of a question submitted to the voters.*"

From the wording of said statute it will be seen that with relation to a question which may be submitted to the voters as the result of an initiative petition, which is the particular subject matter of your inquiries, a committee favoring or opposing such a question does not fall within the statutory definition of a "political committee," and hence is not subject to the statutory regulations governing "political committees," which are to be found in G. L., c. 55, as amended, until the subject matter of its activities is a "question submitted to the voters."

It is necessary to determine in what sense the Legislature used the term "submitted to the voters" in the particular statute, and from its context I am of the opinion that they used it as meaning qualified or ready for submission.

There is no provision in Mass. Const. Amend. XLVIII for the submission to the voters of a measure to be proposed by initiative petition until after six separate and distinct enumerated conditions have been complied with. Only after they have been fulfilled does the constitutional mandate require such submission, in the following language:—"then the secretary of the commonwealth shall submit such proposed law to the people at the next state election."

To construe the word "submitted" in the instant statute as referring to the physical presentation of the question of the adoption of the proposed law to the voters on election day would be to rob the enactment of all meaning, for the functions of a committee such as is referred to in your letter are virtually at an end when the voters go to the polls. A similar mode of construction, applied to the words of the instant statute "in a public election," would likewise render meaningless the provision relative to a form of committee referred to in said section immediately before the form of committee now under consideration. It is a general principle of the law of statutory construction that acts of the Legislature should be construed, if possible, so as to give them force and effect, and if more than one significance may reasonably be attached to the language used, and a literal construction will make a statute absurd and of no effect, the latter construction should not be followed.

After the six conditions precedent to the perfecting of an initiative measure have been completed, the duty devolves upon the Secretary to submit the same to the voters. I am of the opinion that at such time, namely, that of the completion of all the conditions precedent to the exercise of the Secretary's ministerial duty of laying the proposed law before the voters, the question involved can be said to be "submitted to the voters," as those words are used in the instant statute, in view of the context and obvious import of the measure. At that time the term "political committee" can be said to apply to a committee which comes into existence then, or has previously been constituted, to favor or oppose the adoption or rejection of the question whether or not the measure proposed by initiative petition shall become a law.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

State Hospitals — Support of Inmate — Guardian.

Recovery for the price of support furnished an inmate of a State hospital may be enforced against such inmate's funds in the hands of a guardian.

JAN. 13, 1930.

Dr. GEORGE M. KLINE, *Commissioner of Mental Diseases*.

DEAR SIR:— You have asked my opinion as to whether a guardian of an insane woman in an institution for the insane, who has a husband living, can be compelled to pay for the support of his ward from her own estate.

The material parts of the pertinent statute, G. L., c. 123, § 96, as amended, read as follows: —

“The price for the support of inmates of state hospitals, . . . shall be determined by the department at a sum not exceeding ten dollars per week for each person, and *may be recovered of such persons* or of the husband, wife, father, mother, grandfather, grandmother, child or grandchild if of sufficient ability. . . . A married woman shall be subject to the said liability as though sole. Such action shall be brought by the attorney general in the name of the state treasurer.

Any person making payment for such support may recover the same, by suit in equity . . . from any person primarily liable for such support, or may have the amount so paid apportioned among those who are not primarily liable, in proportion to their respective ability to pay, and may recover such apportionment.

Any guardian or conservator of such an inmate who, having property of his ward in his possession or control exceeding two hundred dollars in value, fails to pay, within three months after receipt of any bill therefor, for his support at the rate determined by the department, shall, upon application of the attorney general, forthwith be removed.”

The foregoing provisions confer upon the Commonwealth the right to recover for the price of her support from a female inmate of a State hospital personally. A proper action to recover against her may be brought by the Attorney General. Recovery upon the execution may be enforced against the funds of the inmate in the hands of the guardian. Furthermore, it is provided in the third paragraph of said section 96, above set forth, that it is the duty of the guardian to pay for such support of his ward in the State hospital, irrespective of whether or not a suit be brought, under penalty of his removal from office.

The application of the property of an insane ward by the guardian to the payment of her support in a State hospital, as called for by the terms of G. L., c. 123, § 96, is especially provided for by G. L., c. 201, § 25, which reads as follows: —

“The guardian or conservator of a married woman shall not, except as provided in section ninety-six of chapter one hundred and twenty-three, apply the property of his ward to the maintenance of herself and her family while she is married, unless he is thereto authorized by the probate court on account of the inability of her husband suitably to maintain her or them, or for other cause which the court considers sufficient.”

As I have already pointed out by reference to the statute, suits to recover for the price of support are to be begun by the Attorney General at the instance of the State Treasurer.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Division of Fisheries and Game — Wardens — Right to search Boats without a Warrant — Arrest.

Wardens have the right to search without a warrant boats in coastal waters, where there is reason to believe that fish or game unlawfully taken may be found therein, and may arrest without a warrant, upon such a boat, a person found violating fish or game laws.

JAN. 15, 1930.

HON. WILLIAM A. L. BAZELEY, *Commissioner of Conservation.*

DEAR SIR:— You request my opinion as to the right of wardens of the Division of Fisheries and Game without a warrant to board boats within the harbors or coastal waters of the Commonwealth for the purpose of making search for suspected violations of fish and game laws, and for making arrests for violations of said laws. I understand that the question arises particularly in connection with violations of law by lobster fishermen. Lobsters are included within the designation of "fish," as used in G. L., c. 130, §§ 5 and 6. See V Op. Atty. Gen. 589, 590.

The right to *search* any boat without a warrant, where there is reason to believe that fish or game unlawfully taken may be found, is expressly given by G. L., c. 130, § 6, as amended, which reads as follows:—

"The director, supervisor, a warden, deputy or state police officer, may search any boat, car, box, locker, crate or package, and any building, where he has reason to believe any game or fish unlawfully taken or held may be found, and may seize any game or fish so taken or held, which shall be disposed of in such manner as the director deems for the best interests of the commonwealth; provided, that this section shall not authorize entering a dwelling house, or apply to game or fish passing through this commonwealth under authority of the laws of the United States."

I assume, of course, that your question relates to search in coastal waters which are within the jurisdiction of the Commonwealth, and does not relate to fish passing through the Commonwealth under authority of the United States. See *Commonwealth v. Peters*, 12 Met. 387; *Commonwealth v. Manchester*, 152 Mass. 230; *Commonwealth v. Breakwater Co.*, 214 Mass. 10.

The right to *arrest* without a warrant any person found violating any of the fish or game laws is given by G. L., c. 130, § 5, as amended, in the following words:—

"The director, supervisor, wardens, deputies, state police and all officers qualified to serve criminal process may arrest without a warrant any person found violating any of the fish or game laws, except that persons engaged in the business of regularly dealing in the buying and selling of game as an article of commerce shall not be so arrested for having in possession or selling game at their usual place of business."

G. L., c. 130, § 4, as amended, gives to the wardens of the Division of Fisheries and Game the power, referred to in G. L., c. 130, § 5, as amended, and G. L., c. 91, § 58, of serving criminal process, in the following language:—

"The director, supervisor, wardens and deputies shall have and exercise throughout the commonwealth, for the enforcement of the laws relating to fish, birds, mammals, game and dogs, all the powers of constables, except the service of civil process, and of police officers."

Apparently, additional authority for arrest might, as regards rivers, harbors, bays or sounds, if necessary, be found under G. L., c. 91, § 58, which reads:—

"Any officer qualified to serve criminal process may, within his jurisdiction, arrest without a warrant any person found in the act of com-

mitting a misdemeanor in or upon any of the rivers, harbors, bays or sounds within the commonwealth."

Presumably, a warden would, in the ordinary case, desire to board a boat in the first instance for purposes of search under the power conferred by said section 6; and, being on the boat, he might then, under said section 5 or under G. L., c. 91, § 58, make an arrest of any person he found violating the law. But, on any view, I see no reason why a warden may not arrest a person found violating the fish or game laws on a boat as well as anywhere else. I should suppose that the laws relative to fish could hardly be effectively enforced otherwise.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Civil Service — City Employees — Examinations.

The Commissioner of Civil Service has no power to authorize the appointment of city employees not under civil service to positions under civil service, subject to non-competitive examination, when there are persons upon a list of suitable eligibles for such positions who have taken a competitive examination.

JAN. 15, 1930.

Hon. ELLIOT H. GOODWIN, *Commissioner of Civil Service*.

DEAR SIR: — You request my opinion as to whether you may authorize the appointment of certain city employees, who are not now under civil service, to positions under civil service, subject to non-competitive examination, notwithstanding the fact that you have an eligible list of applicants for such positions established after competitive examination.

G. L., c. 31, § 15, reads as follows: —

"No person shall be appointed to any position in the classified civil service except upon certification by the commissioner from an eligible list in accordance with the rules of the board; but if there is no suitable eligible list, or if the commissioner is unable to comply with a requisition in accordance with the rules of the board, the commissioner, subject to section twenty-five, may authorize a provisional appointment or may authorize the appointing officer or board to select a suitable person who shall be subjected to a non-competitive examination, such provisional or non-competitive appointment to be subject to the rules of the board. Within five days after the certification of persons for appointment or employment the commissioner shall make a record of the persons so certified. If the appointing officer rejects all the persons certified he shall so notify the commissioner."

The statute expressly provides that all appointments must be made from an eligible list, where there is a suitable one. You state: "There is a long list of eligibles to fill each of these positions, established after competitive examination." I assume that you find no reason for holding that such list is not suitable.

I must therefore advise you that you have no power to authorize the appointments in question.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Department of Public Safety — Storage of Film — License.

A license and permit are required under the provisions of G. L., c. 148, § 14, for the storage of nitro cellulose X-ray film by the trustees of a county hospital.

JAN. 28, 1930.

Mr. JOHN W. RETH, *State Fire Marshal*.

DEAR SIR:— You request my opinion (1) as to whether the trustees of a county hospital come within the scope of section 3 of the regulations of the Department of Public Safety governing the storage and use of nitro cellulose X-ray film; and (2) whether the granting of licenses and permits to store such film is governed by section 14 of G. L., c. 148, as amended.

Said section 3 of the regulations reads as follows:—

“No person shall keep, store or sell any nitro cellulose X-ray film in any city or town outside the Metropolitan District in this Commonwealth without a license from the board of aldermen of a city or the selectmen of a town and a permit from the head of the fire department.”

I answer your first question in the affirmative. I see no reason for doubting that the phrase “no person,” as used in said regulations, includes the trustees of a county hospital.

As to your second question, section 14 of G. L., c. 148, provides that no building shall be used for the keeping or storage of any of the articles named in section 10 without a license and permit obtained as therein provided. Said section 10 provides that the Department of Public Safety may make rules and regulations for the storage, use or other disposition of explosives or inflammable fluids and compounds; and may prescribe the materials and construction of buildings to be used therefor. It appears, therefore, that apart from the requirements of section 3 of the regulations, the storage of X-ray film is prohibited by the statute unless a license and permit be obtained in accordance with the statutory requirements. Section 3 of the regulations seems merely confirmatory of the statute.

I am therefore of the opinion that a license and permit are required under the provisions of said section 14 of G. L., c. 148; and that the license and permit referred to in section 3 of the regulations are a license and permit as provided for in said section 14 of the statute.

It is to be further noted that a license and permit to store X-ray film, when obtained under section 14 of the statute, are subject to the various restrictions contained in the regulations of the Department. A recital to that effect might well be inserted in the license and permit.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Department of Public Works — Cape Cod Canal — Telephone Cables.

The Department of Public Works has authority to grant licenses for telephone cables to be laid in the Cape Cod Canal which do not interfere with the exercise of the powers of the Federal government in such canal.

JAN. 28, 1930.

Hon. FRANK E. LYMAN, *Commissioner of Public Works*.

DEAR SIR:— You have asked my opinion in the following communication:—

"The Department of Public Works has received a petition from the New England Telephone and Telegraph Company of Massachusetts for license to lay and maintain a submarine cable in and across the Cape Cod Canal in the town of Bourne. In this connection the question of the jurisdiction of this Board over the tidewaters of the canal, has been raised, particularly in view of the acquisition of this waterway by the Federal government.

Licenses for cables and other structures in the Cape Cod Canal have been issued by this Department and by its predecessors in authority, but none have been granted since the canal became the property of the United States. The Commissioners will much appreciate the receipt of an opinion from you regarding the matter of jurisdiction."

In the first instance, it would appear that general authority to license and prescribe the terms for construction of telephone cables in tidewater below the high-water marks on each side of the Cape Cod Canal was vested in your Department by the provisions of G. L., c. 91, § 14, as amended by St. 1927, c. 106, and under the amendments to G. L., c. 16, made by St. 1927, c. 297, with relation to the organization of your Department.

The acquisition of the Cape Cod Canal by the Federal government changes to some extent the precise manner in which your authority in the aforesaid matters may be exercised.

The sale of the Cape Cod Canal to the United States was authorized by the United States River and Harbor Act, section 2, approved January 21, 1927. Thereafter, as I am advised, the Federal government acquired by purchase the property of the Cape Cod Canal Company and the land which is covered by the waters of the canal.

It does not appear that the purpose of such purchase is within those named in G. L., c. 1, § 7, as to which jurisdiction is ceded to the United States by the terms of said G. L., c. 1, § 7, nor does it appear that the General Court has in any other manner ceded jurisdiction over the lands purchased.

Nevertheless, it has been held that the United States may by purchase acquire title to lands within a State without the consent of the State. When so acquired, however, the jurisdiction of the United States does not oust that of the State, which still remains complete and perfect. Yet, while the United States holds such lands, they are exempt from State control when such State control would destroy or impair the effective use of such lands for the use of the general government for which they have been acquired. As was said by the Supreme Court of the United States in *Fort Leavenworth R.R. Co. v. Lowe*, 114 U. S. 525, 539, with relation to Federal lands acquired without the specific consent of the State wherein they lay:—

"Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But, when not used as such instrumentalities, the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits."

See also VII Op. Atty. Gen. 230; *Newcomb v. Rockport*, 183 Mass. 74.

I am advised that the lands and waters forming the Cape Cod Canal are at the present time being used by the Federal government as instrumentalities of its sovereign authority. If it be a fact that the laying of

cables in or under the canal is an act which has a tendency to interfere with the exercise of such authority by the United States, then your Department has no authority to facilitate such interference by granting a license for such act.

The Attorney General does not pass upon questions of fact. It would appear to be a pure question of fact whether or not the laying of a cable in the canal would interfere with the operations of the Federal government therein when dredging or otherwise working in or utilizing the canal. That is a question of fact which must be resolved in the negative before your Department should attempt to grant such a license as is asked for or to proceed in the matter, and it is a question for your Department to determine in the first instance.

I make this suggestion, which your Department may find helpful in dealing with petitions such as the one referred to in your communication, namely, that your Department should require the production by the petitioner of a certificate from the United States engineers or other authorities in direct charge of the management of the canal to the effect that the license requested by the petitioner would not, in their judgment, tend to interfere with the proper performance of the duties of the United States in operating and maintaining said canal.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Medical Examiner — Authority — Removal of a Dead Body.

A medical examiner has no authority to order the removal of a dead body from one town to another prior to his issuance of a certificate as to the cause of death.

FEB. 8, 1930.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR:— You have requested my opinion upon the following question of law:—

“Has a medical examiner, under the provisions of G. L., c. 38, § 6, which provides that ‘he shall forthwith go to the place where the body lies and take charge of the same,’ authority to order the removal of a body from the place where the body lies to another town within his county, without the permit required by G. L., c. 114, § 45?”

G. L., c. 38, § 6, reads as follows:—

“Medical examiners shall make examination upon the view of the dead bodies of only such persons as are supposed to have died by violence. If a medical examiner has notice that there is within his county the body of such a person, he shall forthwith go to the place where the body lies and take charge of the same; and if, on view thereof and personal inquiry into the cause and manner of death, he considers a further examination necessary, he shall upon written authorization of the district attorney, mayor or selectmen of the district, city or town where the body lies, make an autopsy in the presence of two or more discreet persons, whose attendance he may compel by subpcena. Before making such autopsy he shall call the attention of the witnesses to the appearance and position of the body. He shall then and there carefully record every fact and circumstance tending to show the condition of the body and the cause and manner of death, with the names and addresses of said witnesses, which record he

shall subscribe. If a medical examiner or an associate examiner considers it necessary to have a physician present as a witness at an autopsy, such physician shall receive a fee of five dollars. Other witnesses, except officers named in section fifty of chapter two hundred and sixty-two, shall be allowed two dollars each. A clerk may be employed to reduce to writing the results of a medical examination or autopsy, and shall receive two dollars a day.

The medical examiner may, if he considers it necessary, employ a chemist to aid in the examination of the body or of substances supposed to have caused or contributed to the death, and he shall receive such compensation as the examiner certifies to be just and reasonable."

From the terms of this statute no specific authority is given to the medical examiner to remove a dead body from the town where it lies. The phrase "he shall forthwith go to the place where the body lies and take charge of the same" cannot of itself be construed to give him such authority. Nor is he given such authority by any other statute of which I am cognizant.

Moreover, from a consideration of other provisions of the instant statute and those dealing with the same topic which have previously been enacted, it would appear that the intention of the Legislature was to provide that a dead body should not be removed by the medical examiner from the town where it lies. The general subject matter of the instant statute was first enacted by St. 1877, c. 200, entitled "An Act to abolish the office of coroner and to provide for medical examinations and inquests in case of death by violence." The provisions of this early statute in regard to the duties of medical examiners upon the view, as contained in section 8 thereof, are embodied in G. L., c. 38, § 6, and the statute contained nothing tending to show a legislative intent to authorize the removal of a dead body from the town where it lay. In fact, the provisions of said G. L., c. 38, § 6, that "and if, on view thereof and personal inquiry into the cause and manner of death, he considers a further examination necessary, he shall, upon written authorization of the district attorney, mayor or selectmen of the district, city or town where the body lies, make an autopsy," seem to indicate a general intent that the body should not be removed from the place where it lies, nor did the provision of G. S., c. 175, which regulated the earlier practice under coroners, whose functions were transferred to the medical examiners in 1877, contain provisions authorizing the removal of a dead body from the town where it lay. Indeed, sections 2 and 3 of said chapter 175, providing that the warrant for the coroners' jury should summon the jurors to appear at a designated town, and that the constable serving the same should return the summons "to the place where the dead body is," indicate in their entire context a general intent that there should be no grant of authority to remove the body from one town to another, in the same manner as G. L., c. 38, § 6.

Subsequent to the passage of said St. 1877, c. 200, relative to the duties of the then newly created medical examiners, the Legislature passed St. 1878, c. 174, entitled "An Act to provide for the more accurate registration of vital statistics" (now embodied in G. L., c. 114, § 45, as amended by St. 1927, c. 48), which provides as follows:—

"No human body shall be buried, or removed from any city or town, until a proper certificate has been given by the clerk or local registrar of

statistics to the undertaker or sexton, or person performing the burial, or removing the body. This certificate shall state that the facts required by chapter twenty-one of the General Statutes have been returned and recorded; and no clerk or local registrar shall give such certificate or burial permit until the certificate of the cause of death has been obtained from the physician, if any, in attendance at the last sickness of the deceased, and placed in the hands of said clerk or local registrar: . . . In case of death by violence, the medical examiner attending shall furnish the requisite medical certificate. Any person violating the provisions of this section shall be punished by a fine not exceeding twenty-five dollars."

The main purpose of this statute, namely, the keeping of accurate vital statistics, was made effective by the provision contained therein that no certificate to remove a body from a city or town, upon which alone such removal could be made, might be issued by the city or town authorities until a certificate of the cause of the death had been filed with them; and in case of death by violence this certificate was to be furnished by the medical examiner. The furnishing of the certificate of the cause of death by the medical examiner in cases of death by violence was thus made a prerequisite to the issuing of a certificate of removal or the actual removal of a dead body.

The terms of the instant statute, G. L., c. 114, § 45, as amended by St. 1927, c. 48, which I forbear to quote at length, embody the general scheme relative to vital statistics set forth in said St. 1878, c. 174, and contain nothing which increases the authority of the medical examiner in relation to the removal of dead bodies from one city or town to another beyond what it was under the statute of 1878.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Constitutional Law — Trust Funds — Legislative Powers.

The Legislature cannot usurp the powers of the judiciary over funds held by trustees for charitable purposes.

FEB. 18, 1930.

A. B. CASSON, Esq., *Chairman, House Committee on Bills in the Third Reading.*

DEAR SIR:— You ask my opinion "as to whether or not House Bill No. 76, entitled 'An Act ratifying certain acts of the Trustees of the Eames Ministerial Fund in Holliston and changing the name of said corporation to Endowment Trustees of the First Congregational Church of Holliston,' would, if enacted into law, with the amendments made by the House of Representatives, be constitutional."

House Bill No. 76, as amended by the House of Representatives, provides:—

"SECTION 1. The name of the Trustees of the Eames Ministerial Fund in Holliston, incorporated by an act approved February twenty-fourth, eighteen hundred and twenty-nine and entitled 'An Act to incorporate the trustees of the Eames Ministerial Fund in Holliston,' is hereby changed to the Endowment Trustees of the First Congregational Church of Holliston.

SECTION 2. Said trustees shall be elected by the members of the First Congregational Church of Holliston, and at the first election thereof under the provisions of this act, one shall be elected for one year, one for two years, one for three years, one for four years and one for five years, and thereafter, as the term of any member expires, his successor shall be elected for the term of five years. Any such trustee may be removed from office only upon vote of the members of said church and any vacancy existing among the number of said trustees shall be filled for the unexpired term by said members. The term of office of said trustees now in office shall terminate upon the election of trustees under the provisions of this act.

SECTION 3. Said trustees may, in addition to the powers and duties conferred and imposed upon them by the provisions of the act mentioned in section one of this act, receive, hold and invest all funds and property which have been or shall be conveyed, bequeathed or devised to the trustees of the Eames Ministerial Fund in Holliston, the Endowment Trustees of the First Congregational Church of Holliston or to the First Congregational Church of Holliston in accordance with the terms of such gift, bequest or devise.

SECTION 4. All acts of said trustees of the Eames Ministerial Fund in Holliston in receiving and administering gifts of Susan V. Littlehale and Thomas E. Andrews, in so far as they may have been in excess of authority, and the election of all persons heretofore acting, or purporting to act, as said trustees, are hereby ratified and confirmed."

The Trustees of the Eames Ministerial Fund in Holliston was incorporated by St. 1828, c. 74, approved February 24, 1829, and was empowered to "receive, secure, invest and hold, all monies or other property, or estate, given and bequeathed to the Town of Holliston by Aaron Eames, late of said Holliston, deceased, in and by his last will and testament, the same having been given and bequeathed as above mentioned, upon the special trust and confidence, that the principal thereof should be put on interest, and safely secured as a permanent fund for the support of the Gospel, and the interest and income of the same faithfully applied to the maintenance of a Minister in said town of Holliston." Said corporation was given full power and authority "to make and ordain all necessary regulations and by-laws for their own government, and the security and management of said fund," consistent with law, such regulations and by-laws to be subject to approval by the town of Holliston at a duly constituted regular or special town meeting.

Authority was also given to the town of Holliston to remove from office any trustee who because of age or other incapacity was considered incompetent to discharge the duties of that trust, and to fill all vacancies in said board of trustees. The Legislature, by section 5 of the act, reserved the right to alter, annul or repeal, at its pleasure, and at any time, powers given in said act.

Section 1 of House Bill No. 76 provides for the change of the name of the corporation from the "Trustees of the Eames Ministerial Fund in Holliston" to the "Endowment Trustees of the First Congregational Church of Holliston"; and section 2 of said bill provides for a change in the method of the election of trustees. Under the original act no definite term during which said trustees were to serve as such was established. A trustee, once chosen, could serve during the rest of his life, unless removed by the town meeting of Holliston, because, by reason of his age or other

incapacity, he was deemed incompetent to perform and discharge the duties of said trust.

All vacancies in said board of trustees were required to be filled by the town meeting of said town. Said House Bill No. 76 fixes the terms of office of the trustees, and provides for their election by the members of the First Congregational Church of said town. The power to enact such legislation is within the rights reserved by the Legislature under St. 1828, c. 74, § 5, and within the power of the Legislature "to control its cities" and towns "in their public affairs and in their administration of public charities by controlling the selection of the officers or agents to whom these are to be entrusted." *Ware v. Fitchburg*, 200 Mass. 61, 67, 72.

Section 3 of said House Bill No. 76 is apparently intended to accomplish three purposes:

1. To enlarge the powers of the corporation so as to authorize it to receive, hold, invest and manage as trustee property or funds other than those which it was empowered to receive, hold, invest and manage by the original act of incorporation.

2. To effect by legislative act a transfer to said corporation of the legal title of the property and funds now held by it *ultra vires*.

3. To effect by legislative act a transfer to said corporation of the legal title of the funds or property now held by other parties, namely, the Endowment Trustees of the First Congregational Church of Holliston and the First Congregational Church of Holliston.

So much of the provisions of this section as are intended to carry out the first purpose would be constitutional. *Fellows v. Miner*, 119 Mass. 541. That portion of said section by which it is designed to carry out the second and third purposes would be unconstitutional, because its effect will be to transfer the legal title of such funds or property given, bequeathed or devised to said corporation subsequent to the passage of St. 1828, c. 74, and also to transfer the legal title of the funds or property held by the associations or corporations mentioned therein. The Legislature may enlarge the capacity of the corporation so as to permit it to receive, hold and invest funds which said corporation now holds *ultra vires*, but legislative authority cannot, however, in and of itself, effect a valid transfer of the legal title of said funds or property. In my opinion, a judicial decree is required effectually to transfer to said corporation the legal title of such funds or property now held by it *ultra vires*; but no such transfer may be decreed by the court until the General Court has enlarged the powers of said corporation so as to enable it to hold such property. *Fellows v. Miner*, *supra*. The Legislature cannot by legislative fiat transfer the legal title to property or funds held by a charitable corporation or trustees of a public charity to another charitable corporation or to other trustees. This is purely a judicial function, to be performed by the courts in appropriate proceedings. *Cary v. Bliss*, 151 Mass. 364.

In my opinion, if section 3 of said House Bill No. 76 were enacted into law in its present form, it would be unconstitutional.

Section 4 of said House Bill No. 76 provides for:—

1. The ratification and confirmation of the acts of the trustees in respect to receiving and administering certain gifts and bequests in so far as such acts may be in excess of authority.

2. The ratification and confirmation of the election of all persons who have been acting or purporting to act as trustees.

So much of the provisions of this section as effects the first purpose

outlined above is unconstitutional. Certain rights may have accrued to innocent third persons because of the acts of the trustees. Whether or not such rights have accrued is a subject matter for judicial determination. The General Court cannot by general ratifying provisions divest the courts of their power to make this determination. Mass. Const., pt. 1st, art. XXX.

So much of the provisions of said section 4 as would ratify and confirm the election of the trustees of said corporation would be constitutional. *Ware v. Fitchburg*, 200 Mass. 61.

In my opinion, if said section 4 were enacted into law in its present form, it would be unconstitutional.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Municipalities — Constables — Shellfish.

G. L., c. 130, § 152, does not authorize the appointment of constables for the specific purpose of enforcing the laws relative to shellfish.

FEB. 20, 1930.

Hon. WILLIAM A. L. BAZELEY, *Commissioner of Conservation*.

DEAR SIR:— You ask my opinion as to whether G. L., c. 130, § 152, in providing for the enforcement of the shellfish laws, contemplates the appointment of additional constables, or merely the designation of constables, already duly elected or appointed, to enforce said laws.

G. L., c. 130, § 152, provides:—

“The mayor of a city or the selectmen of a town may designate one or more constables for the detection and prosecution of any violation of the laws of the commonwealth relative to shellfisheries. Such constables may arrest without a warrant any person found violating such laws, and detain him until a warrant for arrest for such violation may be applied for; and may seize any boat or vessel used in such violation, and her tackle, apparel, furniture and implements, which shall be forfeited.”

The foregoing statute does not authorize the appointment of constables by the mayor of a city or the selectmen of a town for the specific purpose of detecting and prosecuting violations of the laws relating to shellfisheries. Provision is made elsewhere in the General Laws for the election or appointment of constables. See G. L., c. 41, §§ 1 and 91A. The duties of constables, generally, are defined in G. L., c. 41, §§ 92–95. The words “may designate one or more constables,” as used in said statute, are to be construed to mean to select one or more constables who have been regularly elected or appointed to that office.

In my opinion, G. L., c. 130, § 152, does not contemplate the appointment of additional constables, but, rather, provides that the mayor or selectmen shall select constables, who have been regularly appointed or elected, to enforce the shellfish laws.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Settlement — Loss — Naval Reserve.

One enrolled in the United States Naval Reserve may lose his settlement, for purposes of military aid, after a period of five years' absence from the State following his discharge from the service.

MARCH 3, 1930.

Mr. RICHARD R. FLYNN, *Commissioner of State Aid and Pensions.*

DEAR SIR:— You request my opinion relative to the settlement of a man formerly in the United States Naval Reserve, the question being as follows:—

“Did this man lose his legal settlement in Massachusetts by being over five years absent from the Commonwealth, from February 25, 1919, when released from active service, to April 26, 1926; or did actual absence from the State begin on September 30, 1921, when he was discharged from the United States Naval Reserve Force?”

Your letter sets forth the following facts:—

“A Massachusetts resident enrolled in the United States Naval Reserve, December 13, 1917, and reported for active duty February 8, 1918; he was *relieved from active duty February 25, 1919*, and honorably discharged from the United States Naval Reserve Force on September 30, 1921.

Between February 25, 1919, and September 10, 1921, he had no actual service in the United States Navy. He was recalled for active duty on September 10, 1921, as a naval reservist, relieved from active duty September 24, 1921, and honorably discharged September 30, 1921.

When this man was relieved from active duty February 25, 1919, he went to work as a civilian employee at the United States Naval Hospital, New London, Connecticut, as an electrical machinist, where he stayed until December, 1919, and then took up a business in New London, Connecticut, and continued in business until he came to Massachusetts, April 26, 1926.

At the time of this man's acceptance for service he was a resident of Revere, Massachusetts, and would thereby, under the provisions of G. L., c. 116, gain a military settlement in that city to entitle him to consideration under the military aid and soldiers' relief laws, provided his legal settlement has not been defeated by five years' absence from Massachusetts after his discharge from the service.”

I assume from these statements that the question of settlement arises in determining whether this man is to be considered as coming within the first or the third class of recipients of military aid, as defined in G. L., c. 115, § 10, as amended, which reads as follows:—

“The recipient of military aid shall belong to and have the qualifications of one of the four following classes:

First class, Each person of the first class shall have his settlement in the town aiding him; shall have served as a soldier, sailor or nurse in the manner and under the limitations prescribed in the first class of section six; shall have been honorably discharged or released from active duty in such United States service and from all appointments and enlistments therein; . . .

Third class, Each person of the third class shall have all the qualifications of persons of the first class except settlement, and shall have been a continuous resident of the commonwealth during the three years last preceding his receipt of military aid and shall be a resident of the town granting the aid."

I draw the further assumption, from the statements contained in your letter, that this man acquired a settlement in Revere by his enrollment in the Naval Reserve on December 13, 1917, and his later service.

G. L., c. 116, § 1, cl. 5, as amended, provides:—

"Legal settlements may be acquired in any town in the following manner and not otherwise:

.
Fifth, A person who enlisted and was mustered into the military or naval service of the United States, as a part of the quota of a town in the commonwealth under any call of the president of the United States during the war of the rebellion or any war between the United States and any foreign power, or who was assigned as a part of the quota thereof after having enlisted and been mustered into said service, and his wife or widow and minor children, shall be deemed thereby to have acquired a settlement in such town; and any person who would otherwise be entitled to a settlement under this clause, but who was not a part of the quota of any town, shall, if he served as a part of the quota of the commonwealth, be deemed to have acquired a settlement, for himself, his wife or widow and minor children, in the place where he actually resided at the time of his enlistment. Any person who was inducted into the military or naval forces of the United States under the federal selective service act, or who enlisted in said forces in time of war between the United States and any foreign power, whether he served as a part of the quota of the commonwealth or not, or who enlisted and served in said forces during the Philippine insurrection, and his wife or widow and minor children shall be deemed to have acquired a settlement in the place where he actually resided in this commonwealth at the time of his induction or enlistment.
."

He would, therefore, with regard to military aid, come within the first class as set forth in G. L., c. 115, § 10, as amended, unless he had lost his settlement because of the provisions of G. L., c. 116, § 5, as amended. Said section 5 provides as follows:—

". . . The settlement existing on August twelfth, nineteen hundred and sixteen, or any settlement subsequently acquired, of a person whose service in or with the army, navy or marine corps of the United States qualifies him to receive aid or relief under the provisions of chapter one hundred and fifteen, and the settlement of his wife, widow until she remarries, father or mother, qualified by his service to receive relief under said chapter one hundred and fifteen, shall not be defeated, except by failure to reside in the commonwealth for five consecutive years or by the acquisition of a new settlement."

The determination of the question as to when the absence from the State began, for the purpose of losing a settlement, depends upon the status of the naval reservist following his release from active duty, and whether he remained in New London, Connecticut, with the settled in-

tention of choosing his place of residence with the object of making it his home. *Whately v. Hatfield*, 196 Mass. 393.

The status of this man immediately following his release from active duty was that of a civilian, except that he could be recalled into active duty in time of war or national emergency. *United States v. MacDonald*, 265 Fed. 695; *United States v. Warden or Keeper of Naval Prison*, 265 Fed. 787. He had the right to take up such civilian employment as he chose and to make his home where he wished. This he could have done then just as freely as before his entry into the Naval Reserve. In the language used in *United States v. MacDonald, supra*, "so far as he was concerned, the time of war was ended," subject, however, to the possibility that he might be recalled in case of war or a national emergency.

I would advise, therefore, that this man lost his legal settlement, as the five-year period began to run immediately following his release from active duty in the Naval Reserve on February 25, 1919.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Counties — State Officers and Employees — Traveling Expenses.

G. L., c. 6, § 10, relative to traveling expenses of officers or employees of the Commonwealth, is not applicable to such expenses of an officer of the State Police traveling on county business.

MARCH 6, 1930.

HON. CHARLES P. HOWARD, *Chairman, Commission on Administration and Finance*.

DEAR SIR: — You request my opinion as to whether an officer of the State Police, assigned at the request of a district attorney to travel outside the State on county business and at county expense, must previously obtain authority from the Governor, under the provisions of G. L., c. 6, § 10, which reads as follows: —

"The governor may appoint state officers as delegates to represent the commonwealth at such conventions as may be held in any part of the United States for the purpose of considering questions of charity, reform, statistics, insurance and other matters affecting the welfare of the people. Their necessary expenses may be paid from such appropriations as the general court may make for the traveling and contingent expenses of such officers. No officer or employee of the commonwealth shall travel outside the commonwealth at public expense unless he has previously been authorized by the governor to leave the commonwealth, and in applying for such authorization the officer or employee shall specify the places to be visited and the probable duration of his absence."

The last sentence in the above statute was added by St. 1920, c. 253, by the passage of a bill presented by the Supervisor of Administration. This bill, as stated in the Supervisor's report, was presented "in the interests of a stricter accounting of expenditures for travel outside of the Commonwealth on the part of State officials and employees, and in order to prevent any abuse of special privileges that may be granted to them."

I am of the opinion that the term "public expense" should be construed as applying solely to disbursements from the treasury of the Common-

wealth, and that the statute is inapplicable to the case of an officer engaged on county work at county expense.

The words "public expense" and the words "officer or employee of the commonwealth" are used in close juxtaposition, and seem naturally to refer to an expense of the Commonwealth. Moreover, this construction seems in accord with the intent of the act as expressed in the Supervisor's report. Careful provision for the supervision of such county expenses as you refer to had been made prior to the enactment of St. 1920, c. 253, and is to be found in G. L., c. 12, § 24, which provides for payment by a county, upon certification of the district attorney and upon approval of the auditor of Suffolk County, or of the county commissioners or a justice of the Superior Court in other counties.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

County Commissioners — Hospital District — Tuberculosis.

The county commissioners of Middlesex County should make payments for a tubercular patient in a certain hospital under stated circumstances.

MARCH 12, 1930.

Dr. GEORGE H. BIGELOW, *Commissioner of Public Health*.

DEAR SIR:— You ask my opinion as to whether the county commissioners of Middlesex County are responsible, under the provisions of St. 1928, c. 385, for hospital care and support of a person suffering from tuberculosis and residing in a town within a hospital district, as defined in G. L., c. 111, § 78, who is admitted to a hospital with which arrangements have been made by the Department of Public Health, and whose admission was made upon application or with the approval of the board of health of the town where such person resides, as required by said St. 1928, c. 385, "irrespective of whether or not said person has a settlement within the hospital district"; and you submit the following facts:—

"A woman was admitted on June 22nd to the Burbank Hospital in Fitchburg from the town of Shirley on application signed by the board of health of that town, as required by the chapter referred to (St. 1928, c. 385). Responsibility was recognized by the county commissioners and the sum of \$324.66 was paid to the hospital for her care. Under date of November 29th the chairman of the county commissioners wrote the Burbank Hospital that there was no settlement within the Commonwealth, and that they were no longer liable and were forwarding to the Commonwealth the bills for money due and for money already paid."

The statutory provisions pertinent to your inquiry are G. L., c. 111, §§ 78 and 79, as amended by St. 1924, c. 501, § 1, and c. 500, § 1, respectively, and St. 1928, c. 385.

G. L., c. 111, § 78, as amended by St. 1924, c. 501, § 1, requires the county commissioners in each county of the Commonwealth to provide "adequate hospital care for all persons residing in towns having less than one hundred thousand population as determined by the last national census, within the boundaries of their respective counties and suffering from tuberculosis, who need such hospital care and for whom hospital provision does not already exist."

G. L., c. 111, § 79, as amended by St. 1924, c. 500, § 1, provides, in part, that a "contract, entered into before September first, nineteen hundred and twenty-five, and approved by the department after a petition made to it and a public hearing thereon, between the county commissioners of any two or more counties for the express purpose of supplying within a reasonable time, as provided in the conditions of approval of the department, and guaranteeing adequate hospital provision for tubercular patients coming under section seventy-eight, shall be deemed satisfactory compliance with said section for such counties or sections of counties as are designated in the contract," and provision is made therein for the renewal of said contracts. Said section also provides:—

"The county commissioners of any county may in like manner and subject to the foregoing provisions relative to renewal contract with the department, for a term of not more than three years. . . . Any such contract with the department shall be deemed satisfactory compliance with section seventy-eight."

St. 1928, c. 385, provides:—

"SECTION 1. The department of public health may arrange for the admission, care and treatment, . . . at any institution within the commonwealth approved by the department, of persons suffering from pulmonary tuberculosis who are residents of any of the cities or towns comprising the territory of the Worcester County or Middlesex County tuberculosis hospital district . . . , and such arrangements shall be deemed to be satisfactory compliance with the provisions of sections seventy-eight to ninety, inclusive, of chapter one hundred and eleven of the General Laws requiring adequate hospital care for such persons.

SECTION 2. The provisions of sections eighty-eight and ninety of said chapter one hundred and eleven shall apply to all persons admitted to any institution under authority of section one, except that the application for any such admission shall be made or approved by the board of health of the city or town in which such person resides, and that the charge for the support of any such person shall in the first instance be paid by the trustees of the tuberculosis hospital district in which such city or town is located. . . ."

Subsequent to the passage of St. 1924, c. 500, § 1, the county commissioners of Middlesex County entered into a contract with the Department of Public Health, of which contract I have personal knowledge and take official cognizance, pursuant to the authority of said St. 1924, c. 500, § 1, and which terminated by operation of law on December 1, 1928. Early in 1928 it was seen that there could not be a compliance by the county commissioners of Middlesex County with so much of the provisions of G. L., c. 111, §§ 78-90, inclusive, as relates to the maintenance of a hospital, and St. 1928, c. 385, above cited, was passed to enable said county commissioners to provide adequate hospital care and treatment for persons suffering from tuberculosis and residing in said district, pending legislative authority to obtain funds for the erection and equipment of a tuberculosis hospital for said county of Middlesex.

Nowhere in G. L., c. 116, §§ 78-90, inclusive, and amendments thereto, does it appear that the admission of a patient to a hospital maintained by a tuberculosis district, or to a hospital or institution with which a con-

tract has been made by one county with another, or by a county with the Department of Public Health, or to a hospital or institution with which arrangements have been made by the Department of Public Health, is conditioned upon a person having a legal settlement in the Commonwealth. The only condition, other than that a person is suffering from tuberculosis and is in need of hospital care, upon which admission to any such hospital depends, is that such person reside in a town within a tuberculosis hospital district.

In my opinion, the words "reside" and "residing," as used in the foregoing statutes, mean "domicil." In *Wilbraham v. Ludlow*, 99 Mass. 587, 592, the court, in defining the term "domicil," stated:—

"Our own adjudged cases sufficiently establish the rule that one who is residing in a place with the purpose of remaining there for an indefinite period of time, and without retaining and keeping up any *animus reverendi*, or intention to return, to the former home which he has abandoned, will have his domicil in the place of his actual residence."

And in *Winans v. Winans*, 205 Mass. 388, 391, the court said:—

"In order to acquire a domicil both the fact and the intent must concur. Actual residence and the intention to remain either permanently or for an indefinite time without any fixed or certain purpose to return to the former place of abode are required to constitute a change of domicil. The length of the residence is immaterial provided the other elements are present and found to exist. A day, or an hour, it has been said, will suffice for the acquisition of a domicil."

A person can acquire a legal settlement only in the manner provided by G. L., c. 116, § 1. The word "reside," as used in said G. L., c. 116, § 1, means domicil. *Stoughton v. Cambridge*, 165 Mass. 251; *Palmer v. Hampden*, 182 Mass. 511; *Whately v. Hatfield*, 196 Mass. 393. VII Op. Atty. Gen., 341, 342. A person may have a domicil in a city or town and at the same time have a legal settlement elsewhere, or he may have a domicil in a city or town and have no known settlement in the Commonwealth.

Under the provisions of St. 1928, c. 385, the legal settlement of a person suffering from tuberculosis is not a factor to be considered before such person can be admitted to an institution with which arrangements have been made by the Department of Public Health, nor is it a factor to be considered in determining the primary liability of the county commissioners of Middlesex County to pay for the care and support of such patient.

If the Legislature had intended that the admission of a person to such a hospital or institution, or that the primary liability to pay for the care and support of such person therein, was to be predicated upon his legal settlement, it would have used appropriate language to express that intent.

If a person residing in Middlesex County and suffering from tuberculosis has been admitted to a hospital or institution with which arrangements have been made by the Department of Public Health, and the application for his admission has been made or approved by the local board of health, "the charge for the support of any such person shall in the first instance be paid by the trustees of the hospital district (county commissioners) in which said city or town is located." St. 1928, c. 385, § 2.

This provision of the statute (St. 1928, c. 385, § 2) is precise and certain in expression, and no reason appears why it should not be given its plain and ordinary meaning. It means that the trustees of the tuberculosis hospital district (county commissioners) shall be directly liable to said hospital or institution for the care and support of such person.

In the instant case, it does not appear in the facts presented by you that the patient resided in the town of Shirley when she was admitted to the Burbank Hospital. The presumption arises, however, that she did have a residence in said town at that time. She was admitted therein upon the application of the local board of health, and payments for her care and support at said hospital were made by the county commissioners of Middlesex County from the date of her entering said hospital to October 1, 1929. The refusal of the county commissioners to make further payments was not based on the non-residence of the patient in Shirley, but was based on the fact, if such is fact, that the patient had no known settlement in this Commonwealth.

In my opinion, the reasons given by the county commissioners of Middlesex County for their refusal to make further payments to the Burbank Hospital for the care and support of said patient are not, as a matter of law, sufficient, and the commissioners are not relieved of the obligation imposed by St. 1928, c. 385.

Yours very truly,
JOSEPH E. WARNER, *Attorney General*.

Cream — Grades — Label.

Only a seller of cream under the designation of "Cream," without the qualifying adjectives used in St. 1929, c. 267, § 2, is required to state on the label the percentage of milk fat therein.

MARCH 15, 1930.

Dr. ARTHUR W. GILBERT, *Commissioner of Agriculture*.

DEAR SIR: — You request my opinion as to whether St. 1929, c. 267, requires a seller of all grades of cream, as they are classified, to state on the label the percentage of milk fat contained therein.

Portions of sections 1 and 2 of said statute pertinent to your inquiry are as follows: —

"SECTION 1. Chapter ninety-four of the General Laws is hereby amended by striking out section twelve and inserting in place thereof the following: — *Section 12.* . . . The Massachusetts legal standard for cream or ungraded cream shall be cream which upon analysis is shown to contain not less than sixteen per cent of milk fat. The Massachusetts legal standard for the grades to be known as light cream, medium cream, heavy cream and extra heavy cream shall be cream which upon analysis is shown to contain not less than sixteen, twenty-five, thirty-four and thirty-eight per cent, respectively, of milk fat.

SECTION 2. Said chapter ninety-four is hereby further amended by striking out section twenty-one and inserting in place thereof the following: — *Section 21.* No person, . . . shall sell, expose for sale, or have in his custody or possession with intent to sell, cream not bearing, upon a label, . . . a statement of one of the following designations conforming to the legal standard for the particular grade or kind as set forth in sec-

tion twelve: 'Light Cream', 'Medium Cream', 'Heavy Cream', 'Extra Heavy Cream', 'Ungraded Cream', or 'Cream' together with the percentage of milk fat contained therein which shall be not less than sixteen per cent. . . ."

Because of the omission of a comma after the word "Cream" in section 2, it is my opinion that the phrase which follows applies only where the substance is sold under the label of "Cream," and that it is not necessary for a dealer who uses on his labels one of the other designations to specify also the percentage of milk fat contained. It was apparently thought by the Legislature that the titles other than "Cream" were sufficiently specific in themselves.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Insurance — Service Contract — Funeral Insurance.

A contract to provide funerals for the contractee and his family, at a designated cost, with a reduction for the first funeral, is a contract of insurance.

MARCH 19, 1930.

HON. MERTON L. BROWN, *Commissioner of Insurance*.

DEAR SIR:— You have asked my opinion as to the character of a service contract, so called, issued by the Metropolitan Funeral Plan, Incorporated, a copy of which you have set forth in a letter containing the following request:—

"The question occurs whether this contract is one of insurance or life insurance within the statutory definition contained in G. L., c. 175, §§ 2 and 118.

I accordingly request that you kindly inform me whether in your opinion this contract constitutes insurance within either of the aforesaid sections."

In my opinion, the contract to which you have directed my attention does constitute a contract of insurance within the meaning of both sections 2 and 118 of G. L., c. 175, as amended.

G. L., c. 175, § 2, reads as follows:—

"A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent, or to do an act valuable to the insured, upon the destruction, loss or injury of something in which the other party has an interest."

The pertinent part of G. L., c. 175, § 118, as amended, reads as follows:—

"*Definition of Life Company.* All companies doing business in the commonwealth under any charter, compact, agreement or statute of this or any other state, involving the payment of money or other thing of value to families or representatives of policy and certificate holders or members, conditioned upon the continuance or cessation of human life . . . shall be deemed to be life companies."

The principles applicable to a determination of the question which you have raised relative to the instant contract were followed in an opinion by former Attorney General Herbert Parker rendered to your depart-

ment in connection with a contract similar in general character, though differing slightly in details, to the one now before me. II Op. Atty. Gen. 480. The then Attorney General in said opinion held that a burial association having members who paid premiums, and to whom it agreed to furnish funerals for themselves and members of their families at an estimated cost, was a life insurance company within the meaning of R. L., c. 118, § 65, which was similar in its terms to those of said G. L., c. 175, § 118, as above set forth.

The corporation selling the contract now before me agrees, for a payment of fifty dollars, to furnish funerals for the purchaser and various members of his family or dependents at a designated cost, and further agrees to the reduction of the designated cost of the first funeral by the amount of thirty dollars.

This contractual arrangement, whereby the contracting corporation promises to do acts valuable to the individual contracting party and those claiming under him, upon the loss of lives in which the individual has a direct interest, for a consideration of fifty dollars, falls squarely within the definition of a contract of insurance as set forth in said section 2. The corporation doing the business incident to said contract, performance of which on its part is conditioned upon the cessation of human life, comes within the definition of a life company as set forth in said section 118, as amended.

The intention shown by the instant contract appears to be to provide insurance for the contracting individual and designated members of his family, in consideration of a payment, against certain losses, to wit: funeral expenses over and above the thirty dollars mentioned in the contract in one instance, and over and above the agreed estimate in all instances, consequent upon death. The contract does not purport to be one for personal services; it is in many features analogous to a contract relative to hospital service, held to be a policy of insurance in an opinion of former Attorney General Jay R. Benton (VII Op. Atty. Gen. 567).

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Taxes — Collector — Uncollected Taxes.

A municipal tax collector is not relieved of all liability for uncollected taxes by the commitment of his lists to his successor in office.

MARCH 21, 1930.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation*.

DEAR SIR: — You have asked my opinion on the following questions: —

1. If a collector who is paid by a fixed salary is not re-elected or re-appointed to office and his lists covering the uncollected taxes are committed with the warrant of the assessors to his successor in office, is he thereby relieved of all liability for such uncollected taxes?

2. If a collector of taxes of a city or town succeeds himself in office, can the board of assessors make a legal recommitment to him, as his own successor in office, of his uncollected taxes as shown by his lists on his original commitment?

I.

G. L., c. 59, § 55, provides as follows: —

“The warrant shall specify the duties of the collector as prescribed by law in the collection of taxes, the times when and the person to whom he shall pay them, shall be substantially in the form heretofore used, and need not be under seal.”

A portion of the form of warrant now in use reads as follows: —

“You are hereby required to levy and collect . . . dollars which is the whole amount assessed . . . And you are to complete and make up an account of the collection of the whole sum of . . . dollars, it being the whole amount hereby committed to you, and transmit and pay over the same in the manner provided by law to . . . , Esq., Treasurer of said town, or to his successor in office, on or before the . . . day of . . . A.D. 19 . . .”

G. L., c. 60, § 13, as amended by St. 1926, c. 65, § 2, provides as follows: —

“The collector shall, before the commitment to him of any taxes of any year, give bond for the faithful performance of his duties in a form approved by the commissioner and in such sum . . .”

The form of bonds now in use and approved by your Department provides that the collector “shall faithfully perform all the duties of said office as required by law.” The bond represents the agreement between the city or town and the collector and his or her surety or sureties. It is the basis upon which action is brought for the non-performance of the duties imposed upon the collector by the provisions of law or any mandate made in accordance with law, such as the directions contained in the collector’s warrant. Upon failure to perform any of those duties the collector is responsible. “The bond of a collector is undoubtedly for each year.” (*Sandwich v. Fish*, 2 Gray, 298.) In *Amherst Bank v. Root*, 2 Met. 522, it was stated: —

“Where a bond is given for the faithful performance of the duties of an office that is, by the law or usage by which it is created, limited to the term of one year, such bond is available only as security against violations of duty happening within that year.” See also *Richardson School Fund v. Dean*, 130 Mass. 242.

In accordance with G. L., c. 60, § 17, as amended by St. 1923, c. 128, § 4, the duty of enforcing the collection within a definite time is placed upon the collector of taxes. Said section 17, as amended, provides: —

“If any tax, betterment or special assessment remains unpaid fourteen days after demand therefor, the collector, in the case of any tax, betterment or special assessment upon real estate, within one year from October first in the year of assessment, and, in case of any other tax, within two years from said October first, shall collect the tax, together with all incidental charges and fees, in the manner provided by law.”

He must, then, collect within this time and, in accordance with G. L., c. 60, § 2, turn over this money to the treasurer. His bond is the contract guaranteeing that this will be done. The only excuse for not doing this is the one recognized by G. L., c. 60, § 95. That section provides: —

"The collector shall be credited with all sums abated; with the amount of taxes assessed upon any person committed to jail for non-payment of his tax within one year from the receipt of the tax list by the collector, and who has not paid his tax; with any sums which the town may see fit to abate to him, due from persons committed after the expiration of a year; with all sums withheld by the treasurer of a town under section ninety-three; and with the amount of the taxes and charges where land has been purchased or taken by the town for non-payment of taxes. When a collector is credited with the amount of taxes assessed upon any person committed to jail for the non-payment of his tax, who has not paid his tax, said collector shall also be paid and credited with the fees and charges which have become a part of said taxes and to which he or the officer acting under his warrant is entitled."

If the tax collector fails to collect these taxes and turn over the money to the treasurer in accordance with the warrant and these provisions of the statute, except in so far as he is excused by section 95, his liability and the liability on the bond are absolute, and there is no provision that liability is to be relieved by the commitment of the uncollected balance to his successor in office.

In *Colerain v. Bell*, 9 Met. 499, the principle is laid down that, where a tax collector is removed from office and the uncollected balance is committed to his successor, he is relieved from liability only to the amount of this uncollected balance which is later collected by his successor. This principle appears to be recognized in *Winthrop v. Soule*, 175 Mass. 400. Sound legal reasoning would seem to make this same principle applicable regardless of whether the term of a collector expired because of his removal or because of his failure of election or of appointment. Your first question is accordingly answered in the negative.

II.

G. L., c. 60, § 97, as amended by St. 1923, c. 128, § 5, reads as follows:—

"Except as provided in section nine, if a collector ceases to hold the office of collector for any reason other than because of the expiration of the term of office of a collector who is not paid by a fixed salary and his failure to be reappointed or reelected, all his accounts, records and papers, except his warrant, which relate to the assessment and collection of taxes in his town shall, forthwith after an audit thereof has been made by a competent accountant, be deposited by him, or his executor or administrator, or any other person into whose possession they may come, with the assessors of such town, who thereupon shall turn over his uncollected tax lists to his successor; together with their warrant, which shall cover the uncollected accounts of the original commitment as shown on said lists and shall also turn over all his accounts, records and papers so deposited with them, except said lists, to the clerk of said town. If the collector is his own successor, he shall complete the collection of the taxes as a part of the duties of his new term of office and not as a part of the duties of his former term of office."

For the purposes of your question the following words, which relate to a collector who is not paid by a fixed salary, may be eliminated,—
"other than because of the expiration of the term of office of a collector who is not paid by a fixed salary and his failure to be reappointed or re-

elected." This section specifically provides for the deposit by the collector of all his books, etc., "except his warrant," with the assessors, who shall thereupon "turn over the uncollected tax lists to his successor, together with their warrant." The warrant is the authority of the collector. Under G. L., c. 60, § 9, the collector is required to deposit his warrant with the clerk of the town at the end of three years. That section, as amended by St. 1923, c. 128, § 1, provides: —

"When all the taxes which have been committed to a collector have been collected or abated, or, in any event, at the end of three years from the date of their commitment to him, he shall deposit with the clerk of the town where he held such office all his accounts, records and papers, including his warrant, which relate to the assessment and collection of such taxes, if not required by section ninety-seven to deposit them sooner with the assessors of such town."

There appears to be no provision for the deposit or return of his warrant sooner than three years after the commitment, except in the case of a completed collection or collection and abatement.

G. L., c. 60, § 15, provides as follows: —

"The collector shall, unless removed from office or unless his tax list has been transferred to his successor, complete the collection of the taxes committed to him, notwithstanding the expiration of his term of office."

The last sentence of G. L., c. 60, § 97, reads as follows: —

"If the collector is his own successor he shall complete the collection of the taxes as a part of the duties of his new term of office and not as a part of the duties of his former term of office."

Upon the completion of the term of office of a collector who succeeds himself, he is already in possession of a warrant empowering him to collect the taxes originally committed to him. The phraseology "complete the collection of the taxes" means that he is to carry on this work which is not yet finished. There is in his case no provision for a new commitment. No further authority is necessary. G. L., c. 60, § 15. If we accept the conclusion that the recommitment to a collector who succeeds himself is not necessary and that it is not provided for by any express provision of law (G. L., c. 60, § 97, as amended), the question will now be whether, under these circumstances, this authority to recommit could be exercised by the board of assessors as fairly implied or incidental to the powers expressly granted. I am of the opinion that, a method having been provided to complete the collection, there is no occasion to read into the statute authority as fairly incidental to other powers expressly granted. *Heard v. Pierce*, 8 Cush. 338; *Providence & Worcester R.R. Co. v. Norwich & Worcester R.R. Co.*, 138 Mass. 277. Accordingly, I therefore answer your second question in the negative.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Civil Service — Health Officer — Laboratory Consultant — City of Springfield.

The health officer of the city of Springfield is exempt from civil service rules.

The laboratory consultant of said city is not so exempt.

MARCH 26, 1930.

Hon. ELLIOT H. GOODWIN, *Commissioner of Civil Service.*

DEAR SIR:— You have requested my opinion as to whether the positions of health officer and laboratory consultant under the board of health of the city of Springfield are exempt from the civil service rules, under G. L., c. 31, § 5.

These two positions are authorized by the city council of the city of Springfield in an ordinance passed December 30, 1929, the pertinent words of which are as follows:—

“The board of health shall . . . appoint a health officer, not a member of the board, who shall perform all such duties as may be required by said board. It may appoint a laboratory consultant who shall perform all such medical and sanitary duties as may be required by said board. Appointments of health officer and of laboratory consultant shall be subject to confirmation by the city council. The health officer shall attend the meetings of the board, shall cause to be made under his supervision all bacteriological examinations, and shall perform such other duties as may be prescribed by ordinance. In case of the prevalence or impending of any infectious or contagious disease within the city he shall give to the mayor or either board of the city council such advice and assistance as may be required by any of them.”

The pertinent part of section 5 of G. L., c. 31, is as follows:—

“No rule made by the board shall apply to the selection or appointment of any of the following:

. . . officers whose appointment is subject to confirmation by the executive council, or by the city council of any city.”

If the health officer and the laboratory consultant are officers of the city of Springfield, within the meaning of G. L., c. 31, § 5, whose appointments are subject to confirmation by the city council, then these appointments need not be made under the civil service rules.

The answer to your question can be made only by determining whether the health officer and the laboratory consultant are officers, as the term “officer” is used in the statute. This depends largely upon the duties to be performed and the tenure of office. See *Attorney General v. Tillinghast*, 203 Mass. 539. “A city council could not evade the statute by providing that a mere employee should be either elected or confirmed by the city council,” and by calling him an officer. See *Attorney General v. Tillinghast*, *supra*, page 542. The rules laid down in that case are as follows:—

“The holder of an office must have entrusted to him some portion of the sovereign authority of the State. His duties must not be merely clerical, or those only of an agent or servant, but must be performed in the execution or administration of the law, in the exercise of power and authority bestowed by the law. . . . A public officer is one ‘whose duties are in their nature public, that is, involving in their performance the exercise of some portion of the sovereign power whether great or small, and in whose proper performance all citizens irrespective of party are interested, either as members of the entire body politic or of some duly established subdivision of it.’ Morton, J., in *Attorney General v. Drohan*, 169 Mass. 534, 535. . . .

Other important tests are the tenure by which a position is held, whether its duration is defined by the statute or ordinance creating it, or whether it is temporary or transient or for a time fixed only by agreement; whether it is created by an appointment or election, or merely by a contract of employment by which the rights of the parties are regulated; whether the compensation is by a salary or fees fixed by law, or by a sum agreed upon by the contract of hiring."

Applying these tests to the position of health officer, it is apparent that the health officer is an officer subject to confirmation by the city council, and is therefore exempt from the civil service rules. The health officer is required to be appointed, and he has important duties of a public nature to perform. He must attend the meetings of the board, he is required to cause to be made under his supervision all bacteriological examinations, and in case of the prevalence or impending of any infectious disease he must render such advice and assistance to the mayor or either board of the city council as may be required by them. Note, too, that by section 4 of the ordinance his tenure of office is for three years, and he may only be removed within that time by the board for cause and with the approval of the city council. No mere employee could render these duties and be removable only for cause. It is my opinion that the health officer of the city of Springfield is an officer exempt from the civil service rules, under section 5 of G. L., c. 31.

As to the other position, the board of health "*may* appoint a laboratory consultant who shall perform all such medical and sanitary duties as may be required by said board." Not a word is said in the ordinance about any other duties he is to perform, nor is anything said concerning his tenure of office. He is a mere employee of the board, and is apparently meant to assist the health officer in his detail work. The board, furthermore, is not obliged to appoint a laboratory consultant, but if it does, his appointment is subject to confirmation by the city council. As I have pointed out, however, confirmation by the city council is not sufficient to exempt the position from the rules of the civil service. The position, to be exempt, must also be an office.

Under the rules as laid down in the Tillinghast case, cited above, it is my opinion that the laboratory consultant is a mere employee, as distinguished from an officer, and hence is not exempt from the civil service rules, under section 5 of G. L., c. 31. See also I Op. Atty. Gen. 72; III Op. Atty. Gen. 129; and *Robertson v. Commissioner of Civil Service*, 259 Mass. 447, 449, and cases there cited.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Civil Service — Veteran — Preference.

A veteran is not entitled to preference in selection, under G. L., c. 31, § 23 or § 24.

A disabled veteran is entitled to preference in being retained in employment, under G. L., c. 31, § 23.

MARCH 29, 1930.

HON. ELLIOT H. GOODWIN, *Commissioner of Civil Service*.

DEAR SIR:— You request my opinion as to certain questions of law relating to veterans' preference, referred to in certain correspondence. I

assume from reading the correspondence that the questions as to which you request my opinion are as follows:—

(1) Is a veteran, other than a disabled veteran, entitled to preference in selection (as well as in certification), under G. L., c. 31, § 23?

(2) Is a veteran entitled to preference in selection in the labor service, under G. L., c. 31, § 24?

(3) Is a disabled veteran who has been given a position in the classified service, under section 23, entitled to preference in being retained at work, when, through lack of work or other cause, it is necessary to suspend some one in the class?

I am constrained by an opinion of the Supreme Judicial Court, rendered in the case of *Corliss v. Civil Service Commissioners*, 242 Mass. 61, to answer the first two questions in the negative.

In that opinion, the court said (p. 64):—

“It is obvious that the statute contains no provision which compels the appointment and employment of a veteran. While he is given preference on the certified lists submitted by the civil service commission, it seems apparent that the statute leaves to the appointing power the right to exercise his discretion in selecting an appointee therefrom.”

As established by that case, the only preference to which any veteran was entitled in seeking appointment to a classified position, under section 23 as it then stood, was a preference in certification; and the court said that the same is true as to veterans registering for employment in the labor service, under section 24. Although by St. 1922, c. 463, said section 23 has been amended as to disabled veterans by a provision that “a disabled veteran shall be appointed and employed in preference to all other persons, including veterans,” yet said section 23, so far as it applies to veterans who are not disabled, stands as it did when before the Supreme Court in the *Corliss* case. Section 24, relating to the labor service, has not been changed in any respect since the Supreme Court’s decision. An opinion substantially to the same effect as this was rendered to the Commissioner of Civil Service by one of my predecessors under date of July 26, 1926 (VIII Op. Atty. Gen. 135).

As to your third question, although it is true that, in some instances, under civil service statutes the word “employment” has been used in connection with the word “appointment” for no other reason probably than that the word “appointment” seemed applicable only to selection for office, yet in the statute now in question it is my opinion that the use of the word “employed,” particularly in connection with the conjunction “and,” indicates an intent that the preference shall extend to continuation in employment as well as to original selection. Accordingly, I answer the third question in the affirmative.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Optometrist — Practice of Medicine — “Doctor.”

No specific provision of law gives to a registered optometrist the right to use the title of “doctor.”

APRIL 7, 1930.

HON. ELLIOT H. GOODWIN, *Commissioner of Civil Service*.

DEAR SIR:— You have asked my opinion, for the benefit of the Board of Registration in Optometry, upon the following question:—

"Has a person duly registered as an optometrist in this Commonwealth the right to use the prefix 'doctor' before his name, provided he also uses the qualifying word 'optometrist' after the name or in connection therewith?"

It does not appear what, if any, matter is now before said Board requiring its action, with relation to which the question is asked. Under long-established practice the Attorney General does not give opinions of law upon purely academic questions or hypothetical cases.

For the guidance of the said Board the Attorney General, however, calls attention to the opinion of the Supreme Judicial Court in *Commonwealth v. Houtenbrink*, 235 Mass. 320, wherein the court, in passing upon certain evidence which it said warranted a finding that the defendant held himself out as a practitioner of medicine, contrary to provisions of law now embodied in G. L., c. 112, § 6, as amended, said (p. 324): —

"The use of the words 'Doctor of Ophthalmology' on his (the defendant's) sign and billheads bears some indication of holding himself out as a practitioner of medicine."

It would seem that the use of the word "optometrist" in qualifying the word "doctor" might, under certain circumstances, likewise fail to prevent the word "doctor" from being an indication that the user held himself out as a practitioner of medicine. My attention has not been directed to any provision of our statutes which specifically gives to a registered optometrist the right to use the word "doctor."

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Division of Registration — Boiler Inspection — Prosecutions.

Prosecutions against persons who violate the laws relative to the sale of boilers may be prosecuted, in municipalities where there are no inspectors of plumbing, by any official charged with the duty of prosecuting offenses against the Commonwealth.

APRIL 7, 1930.

HON. ELLIOT H. GOODWIN, *Commissioner of Civil Service*.

DEAR SIR:— You have asked my opinion upon two questions which have arisen, as I am informed, in connection with a matter actually before the Division of Registration in your Department.

Your questions read as follows: —

"1. Are sections 17, 18 and 19 of G. L., c. 142, applicable to every city and town in the Commonwealth?

2. The last three lines of section 19 read as follows: — 'The inspectors of plumbing within their respective cities and towns shall cause this and the two preceding sections to be enforced.' If these sections apply to every city and town in the Commonwealth, who would enforce the law in the towns where there are no plumbing inspectors and no plumbing regulations?"

G. L., c. 142, §§ 17, 18 and 19, read as follows: —

"SECTION 17. No range boiler shall be sold or offered for sale unless its capacity is plainly marked thereon in terms of Massachusetts stand-

ard liquid measure, and with the maker's business name, in such manner as to be easily identified.

SECTION 18. No copper, iron or steel pressure range boiler, plain or galvanized, or other vessel or tank in which water is to be heated under pressure, shall be sold or offered for sale without having stamped thereon the maker's guarantee that it has been tested to not less than two hundred pounds hydraulic or hydrostatic pressure to the square inch, together with the maximum working pressure at which it may be installed. And no such boiler, or other vessel or tank in which water is to be heated under pressure, shall be installed if the working pressure is greater than forty-two and one half per cent of the guaranteed test pressure marked thereon by the maker.

SECTION 19. Whoever sells or offers or exposes for sale any range boiler not marked or stamped as provided in the two preceding sections, or which is falsely marked as having a capacity which is greater by seven and one half per cent than its true capacity, or who marks or causes the same to be marked with such false capacity, shall be punished by a fine not exceeding fifty dollars. The inspectors of plumbing within their respective cities and towns shall cause this and the two preceding sections to be enforced."

These sections, though now embodied in G. L., c. 142, which is entitled "Supervision of Plumbing," were enacted in their original form by Gen. St. 1916, c. 154, an enactment separate and distinct, and by its provisions unconnected with any laws relative to plumbing. The act was obviously intended by the Legislature to be of state-wide application. The last sentence of section 19, as it now appears, was not contained in said statute of 1916 but was added to the earlier enactment by an amending statute, Gen. St. 1917, c. 39, § 2. The effect of this latter statute was not to limit the state-wide application of the measure but to place the duty of prosecution of offenses under the act upon the holders of certain designated official positions.

I am of the opinion that, when in any given locality such official positions have not been created or do not now exist, the provisions of sections 17, 18 and 19 may be enforced by appropriate procedure under section 19 by any official who may properly prosecute offenses against the Commonwealth. As a practical matter, such a prosecution, if instituted in the district courts, might well be undertaken by a member of the State Police.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Civil Service — City of Somerville — Employment Commission.

The commissioner and assistant commissioner of employment in Somerville are within the terms of the laws relative to civil service.

APRIL 7, 1930.

Hon. ELLIOT H. GOODWIN, *Commissioner of Civil Service*.

DEAR SIR:— You have requested my opinion upon the question of whether the present employment commissioner of the city of Somerville, in charge of the men's division of the municipal employment service, and the assistant commissioner, in charge of the women's division thereof, are heads of a principal department of said city, and as such exempt from the

civil service laws and rules, under the provisions of G. L., c. 31, § 5, as amended by St. 1923, c. 130. Said section 5 reads as follows:—

“No rule made by the board shall apply to the selection or appointment of any of the following:

Judicial officers; officers elected by the people or, except as otherwise expressly provided in this chapter, by a city council; officers whose appointment is subject to confirmation by the executive council, or by the city council of any city; officers whose appointment is subject to the approval of the governor and council; officers elected by either branch of the general court and the appointees of such officers; heads of principal departments of the commonwealth or of a city except as otherwise provided by the preceding section; directors of divisions authorized by law in the departments of the commonwealth; employees of the state treasurer appointed under section five of chapter ten, employees of the commissioner of banks, and of the treasurer and collector of taxes of any city; two employees of the city clerk of any city; public school teachers; secretaries and confidential stenographers of the governor, or of the mayor of any city; clerical employees in the registries of probate of all the counties; police and fire commissioners and chief marshals or chiefs of police and of fire departments, except as provided in section forty-nine, and such others as are by law exempt from the operation of this chapter.”

The charter of the city of Somerville (St. 1899, c. 240) makes no provision for the establishment of a municipal employment service. It contains particular provisions relative to the establishment of a considerable number of designated departments. The board of aldermen had authority, however, to create a new department (see *Attorney General v. Tillinghast*, 203 Mass. 539, 545-6), and I assume, for the purposes of this opinion, without passing upon the point, that it had authority to establish a department of the character indicated by the name “Municipal Employment Service,” and that said board did establish such service as a department by an order passed on January 9, 1930, which you have placed before me, although the name “department” was not specifically given to the service thereby established. This order reads:—

“CITY OF SOMERVILLE
IN BOARD OF ALDERMEN, Jan. 9, 1930.

Ordered:— That a Municipal Employment Service be established in this city in connection with a recommendation of His Honor, Mayor John J. Murphy, in his inaugural address January 6, 1930, and a communication from His Honor dated January 9, 1930.

It is understood that the expense of this service is to be approximately \$7,500 a year, and will employ a commissioner, assistant commissioner and other clerical assistants as needed, and for which an appropriation will be recommended at a later date.

A true copy of an order approved Jan. 11, 1930.

Attest:

NORMAN E. CORWIN,
City Clerk.”

I also assume that by the terms of this order the board of aldermen created the positions of commissioner and assistant commissioner of such new department, and that from information given me, by appointment of the mayor, confirmed by actions of said board, one Ercolini was made

such commissioner and one McGoldrick was made assistant commissioner. The appointments as made by the mayor read as follows:—

“JANUARY TWENTY-THREE
1930.

To the Honorable, the Board of Aldermen.

GENTLEMEN:— I hereby appoint, subject to confirmation by your Honorable Board, Erminio Ercolini as Employment Commissioner in the Municipal Employment Bureau at a salary of \$3,000 per year.

Respectfully,

JOHN J. MURPHY,
Mayor.”

“JANUARY 23, 1930.

To the Honorable, the Board of Aldermen.

GENTLEMEN:— I hereby appoint, subject to confirmation by your Honorable Board, Mary E. McGoldrick as Assistant Commissioner in charge of Women's Division, Municipal Employment Service at a salary of \$2500 per year.

Very truly yours,

JOHN J. MURPHY,
Mayor.”

I am of the opinion that the language of such order and appointment indicates that the commissioner is the head of the new department, and that there was not an appointment of two co-equal commissioners. It follows that the position of assistant commissioner is not that of the head of a department, and hence is not exempt, for that reason, from the application of the civil service law.

Though the commissioner be the head of said department, that fact alone will not relieve the position from the requirements relative to civil service, unless said department is a “principal” department, as that word is used in G. L., c. 31, § 5, as amended. From the information which has been furnished me relative to this employment service, and after a consideration of the inaugural address of the present mayor of Somerville of January 6, 1930, in this respect, his communication to the board of aldermen of January 9, 1930, and the order of the latter body of January 9, 1930, I am of the opinion that this newly created department is not a “principal” department of the city of Somerville, within the meaning of said section 5. (See *Robertson v. Commissioner of Civil Service*, 259 Mass. 447; *Attorney General v. Trehy*, 178 Mass. 186; *Attorney General v. Andrew*, 206 Mass. 46.)

Although it may well be that the said commissioner and assistant commissioner are officers rather than employees of the city, their appointment is not subject to the approval of a city council, and hence they do not fall within the exemption from the civil service laws provided in said section 5 for officers whose appointment is to be so approved. Approval by a board of aldermen is not the equivalent for such purpose of approval by a city council. *Attorney General v. Douglass*, 195 Mass. 35.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Commissioner of Civil Service — Municipalities — Laborers.

It is the duty of the Commissioner of Civil Service to enforce the dismissal of non-citizen laborers of a municipality, under G. L., c. 31, §§ 19 and 37.

APRIL 16, 1930.

Hon. ELLIOT H. GOODWIN, *Commissioner of Civil Service.*

DEAR SIR: — You state that certain non-citizens are employed in the labor service of the city of Springfield; that you have a list of citizens eligible for such employment; and that complaint has been made to you by a citizen of said employment of non-citizens. You request my opinion as to whether you are required to take steps to enforce the dismissal of such non-citizens and the appointment in their places of citizens from the eligible list.

In my opinion, the statute expressly requires you to take such steps. G. L., c. 31, § 19, provides: —

“In all work of any branch of the service of the commonwealth, or of any city or town therein, citizens of the commonwealth shall be given preference.”

Section 37 of said chapter provides: —

“On complaint by any citizen of the commonwealth of the employment of a non-citizen when there is a list of eligibles existing, the commissioner shall take steps to enforce the dismissal of such non-citizen and the appointment in his place of a person from the eligible list.”

You call to my attention the fact that the labor service of the city of Springfield was classified on September 16, 1929, and that all laborers then employed, including some or all of the non-citizens whose employment is now in question, were then entered upon the records of your Department as properly employed under civil service (Rule 30, § 2). I do not see that this fact in any way aids the non-citizens. The word “employment” in this statute (section 37) clearly refers to a continuation in employment and not to the act of appointment. It is true that a question might be raised as to whether the statute is retroactive. That question was expressly left open by the court in *Lee v. Lynn*, 223 Mass. 109, 113. The court said: —

“It is not necessary to determine whether the present statutes are so retroactive as to require the discharge of faithful and efficient aliens in service at the time of their enactment, or whether they relate only to the future, see *Hanscom v. Malden & Melrose Gas Light Co.*, 220 Mass. 1; . . .”

But the statute (G. L., c. 31, §§ 19 and 37) was enacted in 1914 (St. 1914, c. 600); and you do not state that any of the non-citizens whose employment is now in question were employed in their present positions prior to that date. Even assuming that some of them were, it is no doubt true that their present employment is not supported by any contract which pre-existed the statute. Their employment was continued or renewed after the enactment of the statute, and so became subject to it. (It is unnecessary to consider what, if any, difference it would make if any of the non-citizen employees here concerned had been employed in the same positions under civil service prior to the enactment of the statute of 1914. See *Ransom v. Boston*, 192 Mass. 299. The positions here in-

volved were not under civil service until 1929.) There is therefore no need of construing the statute of 1914 as having any retroactive effect in order to apply it to the non-citizens whose employment is now in question. It may be noted, however, that in an opinion rendered by one of my predecessors (IV Op. Atty. Gen. 300) the statute was construed as requiring the dismissal of non-citizens even though employed prior to its enactment.

Yours very truly,
JOSEPH E. WARNER, *Attorney General*.

Insurance — Domestic Fraternal Benefit Corporation — Life Members.

Life members of a domestic fraternal benefit corporation may be exempted from annual dues by by-law.

APRIL 23, 1930.

HON. MERTON L. BROWN, *Commissioner of Insurance*.

DEAR SIR:— You have asked my opinion upon two questions relative to membership in a domestic fraternal benefit corporation which comes within the provisions of G. L., c. 176, § 45.

You advise me that you have before you for your consideration the action of the relief association of the Lynn fire department in paying disability benefits to so-called life members; that these life members were formerly firemen of the Lynn fire department, from the personnel of which, I assume from your communication, the membership of the association is entirely recruited; that they were formerly ordinary members of the association, and that they have attained the status of life members, so called, by virtue of a by-law of said association, which reads as follows:—

“Any person having been a member of this Association for the term of five successive years prior to January 20, 1907, may, upon application to the clerk, become a member for life and receive a certificate to that effect and be exempt from yearly dues.”

These so-called life members, you inform me, are now retired upon a pension from the said fire department.

The questions which you have asked with relation to the foregoing facts are as follows:—

“1. Can ex-members of a fire department, who are no longer in active service, become life members of such a society and thereby become entitled to death, disability or permanent disability benefits without payment of yearly dues?

2. Does the law permit the adoption of a by-law establishing life membership in a society of this class, as above set forth, and can such life members be beneficial members?”

I answer both your questions in the affirmative. I am not aware of any specific statutory provision which forbids the creation of life membership in a domestic fraternal benefit corporation, such as the one under consideration, by the enactment of a by-law such as that above set forth, and I know of no general principle of law applicable to such an association which would render such a by-law void under the existing facts connected with the existence of the association, as you have set them forth.

Associations of the type under consideration have very broad powers of self-government under G. L., c. 176, § 32, which is as follows:—

“Every society may, subject to this chapter, make a constitution and by-laws for its government, admission of members, management of its affairs, and the fixing and readjusting of the rates and contributions of its members from time to time, and may amend its constitution and by-laws, and it shall have such other powers as are necessary or incidental to carry into effect its objects and purposes. The constitution and by-laws may prescribe the officers and elected members of standing committees, who may be *ex officio* directors or other officers corresponding thereto.”

There is no specific provision in the statutes which compels the withdrawal from membership in associations of the type under consideration of such members as have ceased to be regular employees of a municipal fire department in which they functioned at the time they joined such an association. Indeed, G. L., c. 176, § 4, expresses a legislative intent to permit former municipal employees to be members of such associations. This section reads as follows:—

“A corporation which limits its membership to the members of a particular fraternal beneficiary corporation, fraternity or religious denomination, or to the graduates of a designated professional or vocational school, or to the employees or ex-employees of cities or towns or of the commonwealth or of the federal government, or to the employees or ex-employees of a designated firm, business house or corporation, or of any department of a designated firm, business house or corporation, or to persons of the same foreign extraction retaining common national interests and designation, or to persons of the same occupation, may be on the lodge system, and if not on the lodge system shall be governed by a direct vote of its members without the lodge system. A corporation not so limiting its membership shall be on the lodge system, with a representative form of government as defined in sections two and three.”

It is to be noted that although life members in said association are exempted from the payment of annual dues, the said by-law does not purport to relieve them from the liability to pay assessments which may be levied upon the members.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

City of Boston — Police Commissioner — Acting Commissioner.

If a vacancy exists in the office of Police Commissioner for the City of Boston, the Superintendent of Police, if not disqualified, becomes Acting Commissioner.

MAY 6, 1930.

His Excellency FRANK G. ALLEN, *Governor of the Commonwealth*.

SIR:— You have requested my opinion upon the following question of law:—

“The Police Commissioner for the City of Boston having been removed by the Governor, with the advice and consent of the Council, in accordance with the provisions of St. 1906, c. 291, § 7, and that office having been duly

declared vacant, does the Superintendent of Police, or, in case of his absence or disability, the next ranking officer, become Acting Police Commissioner?"

St. 1906, c. 291, § 7, provides, in part, with relation to the appointment, and removal, of the Police Commissioner for the City of Boston, as follows: —

"The governor, with the advice and consent of the council, shall appoint a single police commissioner for the city of Boston, who shall be a citizen of Boston and who shall have resided therein for at least two years immediately preceding the date of his appointment. Such police commissioner shall not engage in any other business and shall be sworn to the faithful performance of the duties of his office before entering upon the same.

Said police commissioner shall be appointed for a term of five years, beginning on the first Monday in June, in the year nineteen hundred and six, and shall hold his office until his successor is appointed and qualified, and any vacancy occurring shall be filled by the governor, with the advice and consent of the council, by an appointment for a term of five years.

Said police commissioner may be removed by the governor, with the advice and consent of the council, for such cause as he shall deem sufficient. Such cause shall be stated in his order of removal."

Section 11 of said chapter 291 provides: —

"The said police commissioner may at any time, subject to removal by him at his pleasure, designate some member of the police force to be acting police commissioner.

In case of the absence or disability of the police commissioner without his having designated an acting commissioner, the superintendent of police, or, in case of his absence or disability, the next ranking officer, or where there are two such officers of equal rank, the senior officer in date of appointment, shall be acting commissioner while such absence or disability continues. An acting police commissioner shall receive no extra compensation for services as such."

You advise me that the Police Commissioner has been removed from office, and I assume from your question that a vacancy now exists in such office.

I am of the opinion that the words "in case of the absence or disability of the police commissioner," as used in the second paragraph of said section 11, indicate a legislative intent to provide for the performance of the duties of such Commissioner by a designated official, in the event of any cause arising which might render the Commissioner unable to perform such duties. The word "disability," as here used, has a broader meaning than mere physical incapacity or other disablement of like character, with "absence," and is not limited to the effect of mere bodily or mental ailments but is employed as a comprehensive term sufficient to cover all disqualifications, of which a total loss of authority and legal capacity to act through removal is one.

It follows that under the terms of said St. 1906, c. 291, the Superintendent of Police is now Acting Police Commissioner unless he be absent or under a disability; in which latter case the next ranking officer, or, if there be more than one of the next rank, then the senior of such in date of appointment, is the Acting Police Commissioner.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Pension — Veteran — Officer.

A veteran of the Civil War who has held the position of assistant register of probate for ten years prior to his election as register of probate is entitled to a pension under G. L., c. 32, § 49, as amended.

MAY 12, 1930.

His Excellency FRANK G. ALLEN, *Governor of the Commonwealth.*

SIR:— You have requested my opinion relative to an application by John D. Cobb for a pension under the provisions of G. L., c. 32, § 49, as amended by St. 1921, c. 279.

The enactment in question reads as follows:—

“A veteran of the civil war in the service of the commonwealth, if incapacitated for active duty, shall be retired from active service, with the consent of the governor, at one half the rate of compensation paid to him when in active service, to be paid by the commonwealth; provided, that no veteran shall be retired under this section unless he shall have been in the service of the commonwealth at least ten years. But if, in the opinion of the governor and council, any veteran of the civil war, after five years in said service, is incapacitated to such a degree as to render his retirement necessary for the good of the service, he may so be retired. A veteran otherwise qualified for retirement under this section, whose term of service was for a fixed number of years which has expired, or whose office has been abolished, shall be entitled to its benefits, without reappointment, from the date of incapacitation, said date to be determined by the governor and to be certified by him to the state auditor.”

Mr. Cobb's application sets forth:—

“As a veteran of the Civil War, Captain, Company I, 35th Regiment, Massachusetts Volunteers, U. S. Army, and having served twenty-five years as assistant register and ten years as register of probate for the County of Norfolk, I apply for a pension (one-half salary), which I understand is the State retirement allowance (according to law) for one with the above record.

It being more than fifteen years since my retirement from office in Dedham (January, 1914), it is very fortunate that the legality of providing for my case seems to be covered by G. L., c. 32, § 49, as amended by St. 1921, c. 279.

Since such a pension can only be granted in response to my personal application, and since I have reached my ninetieth year, it seems wise to delay my petition no longer.”

Accompanying your request is a letter from the Chairman of the Commission on Administration and Finance which states that the records of the Adjutant General's office establish the fact that the applicant is a veteran of the Civil War and that the applicant held the appointive position of assistant register of probate for the County of Norfolk for at least ten years prior to 1904, in which year he was elected register, and was re-elected to that office from time to time, so that he held the same over a period of ten years subsequent to 1904. The salary of the said assistant register was paid by the Commonwealth, he was appointed by the register, and he was obviously in the service of the Commonwealth. See IV Op. Atty. Gen. 54.

It has been held by one of my predecessors in office, in an opinion given on May 22, 1913 (IV Op. Atty. Gen. 54), with which I agree, that registers of probate, being elective officers, are not within the intent of the Legislature in providing for pensions of this character, and that the benefits of such pensions are limited to persons in the service of the Commonwealth whose title to office arises only from appointment.

I am of the opinion, however, that the fact that an appointive officer has, after concluding his services in the position held by appointment, served in an elective office for one or more terms, does not deprive him of the benefits of a pension provided in connection with the appointive office which he first held.

Section 49, at least as to its last sentence, which is applicable to this applicant, inures to his benefit, irrespective of the fact that his appointive service ended prior to the passage of St. 1907, c. 458, which first set forth provisions substantially those of said section 49.

I assume from the documents which you have laid before me that the applicant is incapacitated for active duty. If, as appears from the facts submitted to me by the documents annexed to your request, the applicant served as assistant register of probate for Norfolk County for at least ten years, his term of service, as he was reappointed from time to time, was in each instance for a fixed term of years, within the meaning of the instant statute (see G. S., c. 119, § 11; P. S., c. 158, § 11; R. L., c. 164, § 17; G. L., c. 217, § 23), and he would seem to be "otherwise qualified" for retirement, as the phrase is used in the last sentence of said section 49.

In view of the foregoing considerations, the applicant appears to be entitled to the pension referred to in said section 49, based upon his service and pay as an assistant register of probate for Norfolk County.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Governor and Council — State House Grounds — Legislature.

The Legislature, and not the Governor and Council, is the proper authority to approve the placing of a tablet upon a column within the State House grounds.

MAY 13, 1930.

His Excellency the Governor, and the Honorable Council.

GENTLEMEN:— You request my opinion as to whether the Governor and Council may lawfully approve a request to place a tablet upon a granite column within the State House grounds.

G. L., c. 8, as amended by St. 1922, c. 146, provides:—

"No tablet, statue or other memorial of a permanent character shall be placed in the state house *without the approval of the general court.*"

The word "in" may be broadly construed to effect the legislative intent. I should have no difficulty in construing the statute above quoted as prohibiting the placing of a tablet upon the outside of the building. See *Nash v. Webber*, 204 Mass. 419, 423; *Schaefer v. Houck*, 171 N. Y. S. 146. Although there is, of course, more difficulty in construing the word as equivalent to "in or about," still, in my opinion, that may be done, if necessary to effect what appears to be the legislative intent; and I

think that the proposed action now in question is within the purport of the statute.

In my opinion, application should be made to the Legislature for approval.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Credit Union — Officers — Bonds.

Each officer handling funds of a credit union must give a bond to the directors, as such, and not to the union.

MAY 16, 1930.

Hon. ROY A. HOVEY, *Commissioner of Banks*.

DEAR SIR:— You have asked my opinion in relation to a proposed scheme for the bonding of officers of credit unions who handle funds of such organizations.

You advise me in your letter as to facts in connection therewith as follows:—

“Certain credit unions incorporated in this Commonwealth and doing business under G. L., c. 171, have become members of the Credit Union League of Massachusetts, an unincorporated organization. The league is an organization whose purpose is to assist credit unions both in their organization and establishment and in their operation. In this they perform a valuable service. All incorporated credit unions in this Commonwealth, however, are not members of the Credit Union League. The directors of the credit unions as such are not members of this league. Chapter 171, which regulates the operation of credit unions, does not recognize this organization.

The Century Indemnity Company of Hartford, Connecticut, through one of its agents, is presenting a scheme in connection with the Credit Union League of Massachusetts whereby it proposes to bond all officers handling funds of all credit unions who are members of the league, or as many as will enter into the arrangement, on a schedule form of bond, binding itself to pay to the ‘Credit Union League of Massachusetts or any of its members,’ listed in a schedule attached, as their interest may appear as obligee, such losses as the obligee shall have sustained to the amount of indemnity specified. Under the plan the league is to be made custodian of the bond. The form of the contract is similar to what is termed the ‘statutory form’ furnished at the present time by the officers individually. The arguments advanced in favor of such a bond by those interested are, — more simplicity in handling and recording, both by the credit union and the banking department, and a saving in the rate of premium charged each credit union entering into the arrangement.”

You have laid before me a copy of a bond which it is proposed to use in connection with the said scheme, and you have also written in your letter as follows:—

“Section 15 of said chapter 171 requires that the officers of credit unions handling funds furnish bonds to the directors, which I have assumed as meaning the directors of the credit union of which they are officers. I have also assumed that under this section a director of a credit union should be custodian of the individual bond. As the statute leaves

me somewhat in doubt, I respectfully request your opinion on the following questions which arise:—

1. May others than directors of a certain credit union appear as obligee of a bond furnished by an officer of the credit union handling funds?

2. May the officers of two or more credit unions be included in a schedule form of bond, even if such bond names as obligee the several credit unions whose officers are bonded thereunder?

3. May others than a director of a credit union be custodian of a bond furnished by an officer of a credit union handling funds?"

G. L., c. 171, as amended by St. 1926, c. 273, provides in section 15 thereof as follows:—

"Election of Officers. Committees. Bonds.

The directors at their first meeting after the annual meeting shall elect from their own number a president, one or more vice-presidents, a clerk, a treasurer, a credit committee of not less than three members, an auditing committee of three members, and such other officers as may be necessary for the transaction of the business of the credit union, who shall be the officers of the corporation and who shall hold office until their successors are qualified, unless sooner removed as hereinafter provided. The offices of clerk and treasurer may be held by the same person. No member of the said board of directors shall be a member of both the credit and the auditing committee unless the number of members of the credit union is less than eleven. *Each officer handling funds of a credit union shall give bond to the directors in such amounts and with such surety or sureties and conditions as the commissioner may prescribe, and shall file with him an attested copy thereof, with a certificate of its custodian that the original is in his possession."*

This statute is explicit in its provision that each designated officer of a credit union shall give bond to *the directors*. The intent of the Legislature that such bond shall run to the directors of the union of which each of such officers, respectively, belongs is manifest.

The bond which you have submitted to me, assuming that it is to be so executed as to be the bond of the individual officers named in the schedule annexed thereto, does not purport to run to the directors of the several credit unions to which such officers respectively belong. On the contrary, upon its face, it purports to run to the Credit Union League of Massachusetts or any of its members listed in the annexed schedule, as these interests may appear.

From the facts which you have set forth in your letter it is apparent that the Credit Union League of Massachusetts is not a proper obligee of such a bond, and that as credit unions as such, and not their directors, are members of such league, the proposed bond does not run to the directors of the several unions, as prescribed by the statute. A bond running to a credit union is not a bond given to the directors of a credit union, within the meaning of the instant statute.

It cannot be assumed that by the use of the word "directors," as designating the obligee of the required bond, the Legislature intended to comprehend a credit union as well. Various considerations may have actuated the members of the General Court in giving expression to a legislative intent that the directors rather than the union were to be the obligees, and such intent could scarcely have been expressed in plainer language.

I am of the opinion that the proposed bond as submitted to me is not such as should be given under section 15 of G. L., c. 171, as amended, by the officers of credit unions handling funds thereof. As the proposed bond which you have submitted to me is, as I am informed, the only one now before you as to which you are required to signify your approval, and as to which you have doubt concerning the propriety of its form, I do not deem it necessary to answer your three questions specifically.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Ways — City of Boston — State Highways.

That part of Northern Avenue constructed by the Commonwealth under St. 1903, c. 381, is a highway of the city of Boston.

MAY 20, 1930.

HON. FRANK E. LYMAN, *Commissioner of Public Works*.

DEAR SIR:— You have requested my opinion as to whether that part of Northern Avenue in the city of Boston which has been constructed by the Commonwealth under the provisions of St. 1903, c. 381, across land of the Commonwealth is a State or city highway.

I am of the opinion that the said part of Northern Avenue is a highway of the city of Boston.

The terms of St. 1903, c. 381, which will be set forth in more detail hereafter, laid out as highways certain ways, shown on a plan which you have submitted and which I am informed is identical with the one referred to in St. 1903, c. 381, §§ 1 and 2, to be known as Sleeper Street and Northern Avenue. Part of Northern Avenue so laid out extended over lands owned by the Commonwealth; only a portion of this part has been constructed in a manner approved by city officials. It is this portion alone in respect to which an opinion has been requested. The status of the remaining portion will, however, sufficiently appear from the considerations herein set forth.

St. 1901, c. 507, contains substantially the same provisions as those in question, except that it was to take effect upon acceptance by the city council. The city council did not accept this act of 1901, and that of 1903 was then enacted to take effect upon its passage, May 25, 1903.

No construction under the act of 1903 appears to have been completed by May 25, 1914, on which date the then commissioner of public works of the city of Boston wrote to the Directors of the Port of Boston the following communication, of which you have informed me:—

“With reference to cleaning *Northern avenue* at the new docks, I beg to say that inasmuch as the construction of this street is not yet completed, it is not practicable for this department to attempt to clean it. I can only suggest that until the completion of the street, your Commission arrange, either directly or through the various contractors, to keep the street in such condition as you may consider proper. When the street is completed, including the track-work and the removal of material and other obstructions, if you will kindly notify this department, we will again take charge of the cleaning of the street.”

I am advised that on December 10, 1914, the following letter was sent to the commissioner of public works of Boston, presumably from the Directors of the Port of Boston:—

"Under the provisions of chapter 507 of the Acts of 1901 the Directors of the Port of Boston, as successors to the Board of Harbor and Land Commissioners, have completed the paving and regulating of Northern Avenue across the land of the Commonwealth from the land of the New York, New Haven and Hartford Railroad Company, a distance of about 1600 feet, the construction being in accordance with plans approved by you on May 19, 1913."

The reference in the letter of December 10, 1914, to chapter 507 of the Acts of 1901 is clearly an unintentional error; the reference should, of course, be to chapter 381 of the Acts of 1903, as is recognized in the following report of the engineer of the Department of Public Works of the Commonwealth, which you have laid before me:—

"In accordance with chapter 381 of the Acts of 1903, Northern Avenue has been laid out and built from Atlantic Avenue easterly to about the easterly limit of land leased to the Boston Fish Market Corporation, crossing Fort Point Channel by a bridge and crossing lands of the New England Railroad Company, the New York, New Haven and Hartford Railroad Company and lands of the Commonwealth. Under the provisions of section 3 of said chapter, the Directors of the Port of Boston in 1913 and 1914, in compliance with plans approved May 19, 1913 by the Commissioner of Public Works of the City of Boston, paved that portion of the avenue across lands of the Commonwealth."

In this connection you have advised me in your communication that, —

"From time to time the city has repaved portions of the street and sidewalks and in connection therewith has required the Department to repave the portion between the rails of tracks of the Commonwealth crossing the Avenue, at the expense of the Commonwealth."

In writing this opinion I shall assume, then, that a portion of the layout over Commonwealth land, namely, that referred to in the foregoing report of the department engineer, has been constructed in accordance with plans approved by an officer of the city who has succeeded to the rights and duties of the city engineer sometime subsequent to February 1, 1911, and that it has been and is being used for public travel.

St. 1903, c. 381, provides:—

"SECTION 1. Northern avenue is hereby laid out in the city of Boston from Atlantic avenue near Oliver street easterly to Fort Point channel, thence across said channel by a bridge, and thence across lands of the . . . Railroad Company, and lands of the Commonwealth; . . . as shown on a plan in the office of the harbor and land commissioners, entitled, 'Plan of the Location of Northern Avenue from Atlantic Avenue to and over the Lands and Flats of the Commonwealth at South Boston, and of Sleeper Street from Congress Street to Northern Avenue, March, 1903 . . .'; reserving however to said railroad companies, their successors and assigns, the right to lay and operate at grade two tracks along and others across the land owned by them and included within said Northern avenue, . . . substantially as shown on said plan; and reserving to the Commonwealth and its assigns similar rights of laying two tracks along and others across said avenue, in the lands owned by the Commonwealth and included within said avenue. *Said avenue and street shall be highways: provided, however, that the manner of constructing and operating the railroad tracks in and across the same, and the highway*

traffic and travel upon and other uses of Northern avenue shall be regulated, and the location of the tracks along said avenue and street shall be determined by the board of railroad commissioners, who, having due regard to the intent and purpose hereof, shall in writing from time to time prescribe the regulations, and may change or modify the same.

SECTION 2. The board of harbor and land commissioners shall forthwith file in the registry of deeds for the county of Suffolk a copy of the foregoing section, together with a duplicate of the plan described therein, signed by the commissioners; and any person whose property is taken for said avenue or street, and who is entitled to damages therefor, shall have such damages paid by the city. . . .

SECTION 3. The railroad companies aforesaid shall, upon the filing of the copies aforesaid, forthwith release to said city . . . their lands included within said avenue . . . and the city engineer, in the name and behalf of said city, shall forthwith thereafter construct said avenue from Atlantic avenue to the land of the Commonwealth, and said Sleeper street from said Congress street to said Northern avenue, and shall construct said bridge . . . in accordance with such plans and specifications as shall be approved by the board of harbor and land commissioners; and said board, in the name and behalf of the Commonwealth, shall from time to time, in a manner approved by said city engineer, construct the remainder of said avenue and any extensions thereof which may hereafter be made over the lands of the Commonwealth.

SECTION 4. The Commonwealth shall pay to said city from time to time, as the work progresses, upon the order of the board of harbor and land commissioners, the sum of two hundred and sixty thousand dollars out of the Commonwealth's Flats Improvement Fund, established by chapter two hundred and thirty-seven of the acts of the year eighteen hundred and seventy-eight, and said city shall use the money so paid to meet the expenses of taking lands and the expenses incurred by said city engineer under authority of this act; and the treasurer of said city, from time to time, on the request of the mayor, shall issue bonds of said city, outside of its legal debt limit, to the amount required, retain the proceeds thereof in its treasury, and pay therefrom the remainder of the expenses incurred by said city engineer in carrying out the work required of said city or of said engineer under authority of this act.

SECTION 5. Chapter five hundred and seven of the acts of the year nineteen hundred and one is hereby repealed.

SECTION 6. This act shall take effect upon its passage."

The words "said avenue and street shall be highways" occur in section 1, and it is important to determine their meaning as employed in relation to the context of the whole chapter. The use of the word "highways" in this chapter will be seen to carry the meaning of a way opened to public travel, as distinguished from a private way, and not in any sense to indicate State highways in distinction from town or private ways. The word is used here in introducing the proviso reserving certain rights of regulation in derogation of an unrestricted public easement.

An examination of the provisions of the Revised Laws of 1902, which delineate the legal background of the highway system in this Commonwealth at the time the instant statute was passed, shows that it devotes a separate chapter to "State Highways" (c. 47), whereas chapter 48, entitled "Of the Laying Out and Discontinuance of Ways and of Damages Caused by the Taking of Land for Public Uses," is divided into divisions

dealing with separate subjects, two of which are headed, respectively, "Highways" and "Town Ways and Private Ways."

In 1835, in the case of *Commonwealth v. Boston*, 16 Pick. 442, the court said, at page 444:—

"It is now considered, that the distinction between a town-way and a highway, rather refers to the manner in which they are originally established, than to their legal character when established; that the public at large have the same beneficial use of a town-way as of a highway; that it is equally the duty of the town to keep them in repair; . . ."

Furthermore, in every portion of chapter 47 in which a distinction between a State highway and a highway which is not such is important and is sought to be made, the words "state highway" are employed; as in section 6, providing that after the Commonwealth has laid out and taken charge of a new or existing way it shall thereafter be a State highway; and as in sections 7, 9, 10, 13 (providing for the Commonwealth's liability for injuries from defects in State highways) and 14.

In any case, I am here concerned with the construction and effect of a special act, which contains more than one clear indication of the Legislature's intention that the layout shall at some time become a public way for the maintenance and repair of which the city is to be responsible.

One such indication is the reservation to the Commonwealth of rights to lay tracks along and across the avenue in the lands owned by the Commonwealth; such a reservation would appear to be unnecessary if the way were to be a State highway. St. 1903, c. 381, § 1.

Another manifestation of the intention is the provision that any construction, even though across lands of the Commonwealth, shall be in a manner approved by the city engineer. St. 1903, c. 381, § 3.

The distinction made in the statute between the portion of the layout which is upon lands of the railroad and that portion which is upon lands of the Commonwealth, as to the agency which was to perform the construction, was undoubtedly made on account of the obvious impropriety of delegating to a municipality the power to decide from time to time upon the necessity of extending the construction over land of the State which created it. Regarding the whole development in its entirety, then, it would seem that had not a part of it extended over Commonwealth land the whole project would have been placed in the discretion and hands of the city engineer. This being the reasonable explanation of the Commonwealth's part in the construction, there exists no other basis for a contention that a State highway was intended.

It being clear, then, that the Legislature intended by St. 1903, c. 381, to lay out a way for which the city should become responsible, the question is whether the land laid out has yet taken on this character in whole or in part.

In the first place, the adjudication that a way is of common convenience and necessity does not by itself convert the way into a public way.

In *Loker v. Damon*, 17 Pick. 284 (1835), an action of trespass instituted by the owner against one entering the part laid out, before construction, the court said (p. 287): "It is not the magic of a judicial decree, that converts forests and morasses into actual highways." See to the same effect, — *Bliss v. Deerfield*, 13 Pick. 102 (1832); *Drury v. Worcester*, 21 Pick. 44 (1838); and *Bowman v. Boston*, 5 Cush. 1 (1849). That which is necessary to be done before a way becomes a public way after construction is the opening for use. *Commonwealth v. Boston & Lowell R.R. Corp.*,

12 Cush. 254 (1853). A formal acceptance by the city is not necessary. *Durant v. Lawrence*, 1 Allen, 125 (1861); and *Bliss v. Deerfield*, *supra*.

Bliss v. Deerfield, *supra*, was an action for injuries due to a defect in a highway. By St. 1825, c. 171, the commissioners were required to finish all roads to their acceptance, which they had not done in the particular instance before the court. The road had, however, been constructed, opened for public travel and used for such, and the town was held liable. The court said (p. 109):—

“What is evidence of the opening of the road for public use, what constitutes notice to the public, that those whose duty it is to make it consider it finished and opened for use, the statutes on the subject have nowhere provided. It is then a fact to be proved by the acts, conduct and declarations of those whose duty it is to finish and open it.”

In *Drury v. Worcester*, *supra*, the town was held liable for a defect after the road was actually opened to public travel, although the town had expressly refused to accept the way. In that case the court said (p. 49):—

“It follows . . . that whenever by positive act or tacit permission, they (the town) suffer a highway to be opened to public use, and to be actually used by the public, the town becomes responsible for its safe condition.”

Apparently, sufficient tacit permission is found in a knowledge that the way has been constructed and is being used for public travel, coupled with a failure to take steps to notify the public of its lack of responsibility and to close the way. The only specific act of acceptance, then, which must be performed by the city in the instant matter is the approval by the city engineer of the manner of construction, under section 3. Your Department advises me that approval was obtained from the commissioner of public works of the city of Boston, in whom were vested, by a city ordinance of 1910 (c. 9), effective February 1, 1911, the rights and duties of the city engineer, and who thus became the proper official to comply with this provision.

It need scarcely be remarked that R. L., c. 48, § 92, providing that a laying out shall be void as against the owner unless possession is taken within two years, is in no way pertinent to the instant matter, since a breach of this section can be availed of only by the owner [*Pickford v. Lynn*, 98 Mass. 491 (1868)], and more particularly since the act of 1903 specifically provides for a departure from the general rule by allowing the construction to take place “from time to time.” St. 1903, c. 381, § 3. See also *Commonwealth v. Boston*, 16 Pick. 442, 446.

The only remaining question is that raised by the fact that only a portion of the land laid out has been constructed. That a program of piecemeal construction was contemplated is clear, as already pointed out; but it might be contended that the intention was that, even though the layout was to become a highway in charge of the city when completed, this result was not to follow until the completion of the whole development. The case of *Commonwealth v. Boston*, 16 Pick. 442 (1835), arose upon circumstances so similar to those before me as to provide an answer to this contention. St. 1803, c. 111, provided for the annexation to Boston of South Boston and authorized the selectmen to lay out streets therein, and provided, also, that the city should not be obliged to complete the streets so laid out sooner than they might deem it expedient. In pursuance of this

authority the selectmen made a layout and constructed and opened some of the streets so laid out, and an indictment against the city for failure to maintain one of the streets so constructed and opened was sustained. The court recognized the general law then in force requiring the immediate construction and maintenance of any way laid out, but held that the effect of the special proviso, that the selectmen should not be obliged to complete the streets sooner than they might deem it expedient, was to place entirely in the power of the town the authority to act and to declare this expediency in regard to the whole, any part or none of the layout. With specific importance for the instant case was the further decision of the court that as soon as the requirements of construction, opening and declaration of expediency were fulfilled as to any part of this layout, that part became a public way for the maintenance of which the city was responsible.

The converse of this proposition was applied in *Bowman v. Boston*, 5 Cush. 1 (1849), wherein the plaintiff was non-suited in an action for injuries sustained upon a part of the same layout under which *Commonwealth v. Boston*, *supra*, arose, since, although some construction and travel had taken place, the city had not declared that that specific portion should become a completed way.

In summary, then: By St. 1903, c. 381, the Legislature made a layout upon which it contemplated that final construction should take place from time to time, and which it intended should at some time become, at least in part, a public way for the maintenance of which the city should be responsible. I am of the opinion that upon the construction of any portion of the layout in accordance with the statute, and its opening and use for public travel under such circumstances as to leave no question as to the city's notice thereof, such portion became such a public way, rather than that such a result was to wait upon a construction of the whole layout, which might never take place.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Lord's Day — City or Town Clerk — Performance of Duties.

A city or town clerk is not under a duty to deliver on Sunday a certificate of intention to marry.

MAY 27, 1930.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR: — You have asked my opinion in the following communication: —

"Will you kindly advise me whether, under the provisions of G. L., c. 207, § 28, as amended by St. 1930, c. 51, and considered in connection with St. 1930, c. 141, a city or town clerk is obliged to deliver certificates of marriage intention on Sundays and holidays when the fifth day falls on a Sunday or a holiday."

In my opinion, a city or town clerk is not required to deliver certificates of marriage intention on the fifth day after the filing of the notice of intention when such day falls upon a Sunday or a legal holiday.

G. L., c. 207, § 28, as amended by St. 1930, c. 51, § 1, reads: —

"On or after the fifth day from the filing of notice of intention of marriage, except as otherwise provided, but not in any event later than six

months after such filing, the clerk or registrar shall deliver to the parties a certificate signed by him, specifying the date when notice was filed with him and all facts relative to the marriage which are required by law to be ascertained and recorded, except those relative to the person by whom the marriage is to be solemnized. Such certificate shall be delivered to the minister or magistrate before whom the marriage is to be contracted, before he proceeds to solemnize the same. If such certificate is not sooner used, it shall be returned to the office issuing it within six months after the date when notice of intention of marriage was filed."

It is my opinion that the words "on or after the fifth day from the filing of notice of intention of marriage . . . but not in any event later than six months after such filing, the clerk or registrar shall deliver to the parties a certificate" constitute a general mandatory provision requiring the clerk or registrar to deliver the certificate on the fifth day, unless some specific principle of law or the absence of a request operate to relieve him from this duty. The words "but not in any event later than six months after such filing" do not of themselves, I believe, so operate, but only provide the maximum period of validity of a certificate.

G. L., c. 4, § 9, reads:—

"Except as otherwise provided, when the day or the last day for the performance of any act, including the making of any payment or tender of payment, authorized or required by statute or by contract, falls on Sunday or a legal holiday, the act may, unless it is specifically authorized or required to be performed on Sunday or on a legal holiday, be performed on the next succeeding business day."

It is clear that this section will operate to relieve the clerk or registrar from the duty of performing the act on the fifth day when it falls on a Sunday or a legal holiday "unless it is specifically authorized or required to be performed" on such a day; and I find no such specific authorization or requirement in the law.

True, G. L., c. 207, § 19, contains the words: "in determining the fifth day referred to in section twenty-eight, Sundays and holidays shall be counted." These words, however, do not, in my opinion, constitute a specific authorization, much less a requirement, that the act be performed on a Sunday or a holiday; they apply only to the manner of computing the five-day period, and were in no manner designed to alter the legal significance of the fifth day so as to create an obligation to perform an act on that day which would not otherwise have existed.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Voter — Officers of the Navy — Residence.

A naval officer having a residence in the Commonwealth, other than the United States Navy Yard, for one year, and for six months in a town, may vote in such town.

MAY 28, 1930.

His Excellency FRANK G. ALLEN, *Governor of the Commonwealth*.

SIR:— You have asked my opinion as to "whether or not the officers in the Navy Yard can vote." I assume that only the matter of residence is in question, and that these officers have all the other qualifications as voters which are required in this Commonwealth.

The residence required is governed by G. L., c. 51, § 1, as amended by St. 1922, c. 305:—

“Every citizen twenty-one years of age or older, not being a pauper or person under guardianship, who can read the constitution of the commonwealth in English and write his name, and who has resided in the commonwealth one year and in the city or town where he claims a right to vote six months last preceding a state, city or town election, and who has complied with the requirements of this chapter, may have his name entered on the list of voters in such city or town, and may vote therein in any such election or in any meeting held for the transaction of town affairs. . . .”

The residence which is required by this statute cannot be acquired merely by residence of naval officers in the Navy Yard.

Some years ago the opinion of the justices of the Supreme Judicial Court (1 Met. 580) was asked as to the rights and duties of persons residing on land purchased by, or ceded to, the United States for navy yards, arsenals, dock yards, forts, lighthouses, hospitals and armories in this Commonwealth. The question asked was: Are persons so residing entitled to elective franchise? The justices, in discussing this question, considered it as intended to apply only to the larger and more important establishments, such as the Navy Yard at Charlestown and the Arsenal in Springfield, because the answer might be affected by the construction of the different acts by which jurisdiction had been ceded by the Commonwealth to the United States. The answer of the justices was:—

“We are also of opinion that persons residing in such territory do not thereby acquire any elective franchise as inhabitants of the towns in which such territory is situated.”

The reasoning of that opinion is to the effect that, the State having given consent to the purchase of the territory by the United States, and there being no other condition or reservation in the act granting such consent but that of a concurrent jurisdiction of the State for the service of civil and criminal process, persons residing within said territory did not acquire the civil or political privileges, nor did they become subject to the civil duties and obligations, of the town within which such territory was situated. The principle of law laid down in said opinion has been followed and that opinion has been cited in several cases. *Newcomb v. Rockport*, 183 Mass. 74; *Beekman v. Hudson River West Shore Ry. Co.*, 35 Fed. 3; *Ex parte White*, 228 Fed. 88; *Fort Leavenworth R.R. Co. v. Lowe*, 114 U. S. 525; *McMahon v. Polk*, 10 S. D. 296.

Though the said opinion of the justices was to the effect that persons residing in the Navy Yard did not thereby acquire any elective franchise, it may well be that certain naval officers residing in the Navy Yard may come within the provisions of G. L., c. 51, § 50 (as amended by St. 1929, c. 128) and § 51, which are as follows:—

“SECTION 50. Any soldier or sailor in the service of the United States who had a legal residence in any city or town in the commonwealth at the time of entering said service, but who by reason of his being in the army or navy was absent from the city or town during the periods when sessions for listing or assessing and for registration were held, may appear before the city or town clerk in any city or town where such clerk is also a member of the board of registrars, and, in any other city or town, before the

chairman of the board of registrars or board performing like duties therein, during the regular office hours of such clerk or chairman and, in accordance with this chapter, prove his qualifications as a voter under section one and be registered, if he so appears not less than three days before the election; but such registration shall be subject to the revision and acceptance of the board.

SECTION 51. To every person registered under the preceding section the registrars shall issue a certificate, similar to that provided for in section fifty-nine, entitled 'Supplementary Registration: Soldier or Sailor', and referring by chapter and section number to this and the preceding section. Upon presentation of the certificate to the presiding officer at the proper polling place, he shall have the same right to vote as any other registered voter. After he has voted, the presiding officer shall attach the certificate to the voting list and it shall be considered a part thereof, and shall be returned to the registrars and preserved in accordance with law."

If officers in the Navy Yard do in fact come within the provisions of these sections of G. L., c. 51, they will be entitled to vote upon complying with the terms set out in said sections.

Furthermore, it is well-settled law that a person in the military or naval service may establish a residence or domicile at a place apart from that at which he is stationed. It is also settled that such a person may change his residence or domicile while in the service. *Moor v. Harvey*, 128 Mass. 219; *Ex parte White*, 228 Fed. 88. If a residence so established or changed has been of a duration of one year in the Commonwealth and six months in the city or town where the naval officer wished to vote, this would be a compliance with the statute in so far as the provision related to residence.

To sum up, assuming the possession of other qualifications except residence, I answer your question as follows:—

(a) A naval officer does not acquire the right to vote because of a residence at the Navy Yard.

(b) A naval officer, if he had a legal residence in any city or town in the Commonwealth at the time of entering said service, even if by reason of his being in the Navy he was absent from such city or town during the periods when sessions for listing or assessing and for registrations were held, may vote in accordance with G. L., c. 51, § 50, as amended, and § 51, upon compliance with the provisions of said sections.

(c) A naval officer, if he has a residence apart from the Navy Yard for one year in the Commonwealth and for six months in the town where he wishes to vote, may vote in said town.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

State Police Officer — Duties — Reward.

A State police officer may not accept a reward from the United States Collector of Customs for information resulting in the arrest of a violator of a Federal liquor law.

MAY 28, 1930.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety*.

DEAR SIR:— You request my opinion as to whether a State police officer may accept an award of money which the United States Collector

of Customs is ready to pay because of information given by such police officer to Federal officials, which resulted in the seizure by Federal officials of certain liquor at East Brewster, Massachusetts, for violation of the customs laws.

G. L., c. 147, § 3, reads as follows: —

“Any officer or inspector of the department who directly or indirectly receives a reward, gift or gratuity on account of his official services shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than three months, and shall also be discharged from office. Any officer or inspector who fails to faithfully perform his duties shall be immediately discharged from office.”

It was seemingly the duty of the State police officer, in view of his information, to take steps to bring about the seizure of this liquor either under the laws of the Commonwealth or under Federal laws. His failure to act to bring about the seizure under the laws of the Commonwealth could be excused only by his reporting his information to the Federal officials. The report which he made was therefore made in the course of duty. The acceptance of a reward for making such report would be, in my opinion, a violation of the statute above quoted.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

State Employees — Veteran — Period of Service.

The time of military service of an employee in the Department of Correction cannot be added to his time as such employee, so as to bring his total period of service as such employee up to ten years.

MAY 29, 1930.

His Excellency FRANK G. ALLEN, *Governor of the Commonwealth*.

SIR: — You have requested an opinion in relation to a request for a pension by an employee at the Concord Reformatory. You have submitted to me statements of facts, and documents relative thereto, presented by said employee and by the Chairman of the Commission on Administration and Finance.

The question of law presented by the request and by the facts is simply this: Has the said employee, a veteran, now incapacitated for active duty, been in the service of the Commonwealth for a total period of ten years, within the meaning of G. L., c. 32, § 57, as amended, so as to entitle him to a pension under the terms of said G. L., c. 32, § 57, as amended?

I am of the opinion, upon the facts stated, that it cannot be said that the employee has been in the service of the Commonwealth for such a period, and that therefore he is not now entitled to a pension under G. L., c. 32, § 57, as amended by St. 1923, c. 386.

G. L., c. 32, § 57, as amended, reads as follows: —

“A veteran who has been in the service of the commonwealth or of any county, city, town or district thereof, for a total period of ten years, may, upon petition to the retiring authority, be retired, in the discretion of said authority, from active service, at one half the regular rate of compensation paid to him at the time of retirement, and payable from the same source, if he is found by said authority to have become inca-

pacitated for active service; provided, that he has a total income, from all sources, exclusive of such retirement allowance and of any sum received from the government of the United States as a pension for war service, not exceeding five hundred dollars."

The use of the words "for a total period of ten years," in the instant statute, so differentiates its terms from those of G. L., c. 32, § 52, as to indicate a legislative intent that the period of service need not be a continuous period, as was held by the Supreme Judicial Court to have been the intended meaning of said section 52 with relation to the type of service described therein (see *Gray v. Salem*, 258 Mass. 559). Nevertheless, upon the facts stated, it does not appear that the veteran employee has been in the service of the Commonwealth, within the meaning of said G. L., c. 32, § 57, as amended, for even a total period of ten years. It appears, rather, that said employee has been in such service, upon the facts stated, at the longest, nine years and five months to the date of May 15th.

It has been suggested in the correspondence annexed to your communication to me that the period of the military service of said veteran employee might be added to the said nine years and five months, so that his period in the service of the Commonwealth might be figured to be ten years. Such a course does not appear to be within the intent of the Legislature in enacting the applicable statute.

Said employee, to use his own words, "severed" his "connection with the State to enter the United States Army June 5, 1917."

A special provision for the benefit of employees who leave the service for the purpose of entering the Army was enacted by G. L., c. 31, § 27. It provides for their reinstatement in their former positions. The employee has had the benefit which he, as a veteran, was given by such provision. I cannot, however, find that the effect of this statute was intended to extend beyond the specific relief provided, so as to give to the military service of an employee of the Commonwealth the additional character of service of the Commonwealth, under G. L., c. 32, § 57; nor do I find any other statute which effects this result.

Assuming all the facts laid before me to be as stated, the employee in question will be entitled to a pension after the lapse of some seven months from May 15th of this year.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Securities — Sale on Installments — Security.

Under G. L., c. 174, it is not necessary that a company selling securities on the installment plan shall provide security to the face value of such securities.

MAY 29, 1930.

Hon. ROY A. HOVEY, *Commissioner of Banks*.

DEAR SIR: — You have written me, in part, as follows: —

"G. L., c. 174, deals with companies engaged in the business of issuing, negotiating or selling bonds, certificates or obligations of any kind on the partial payment or installment plan, and makes certain provisions for the conduct of their business. Section 1 of the chapter exempts from the requirements corporations which issue, negotiate or sell bonds, certificates

or obligations on the partial payment plan when such, at the time of issuance, are secured by adequate property, real or personal.

In order properly to apply a test which determines whether or not a corporation is subject to the requirements of this chapter, the question has arisen as to the amount of security necessary to be exempt from, and to avoid, violating this chapter; that is, whether the face amount of the bond, certificate or obligation must be secured, or only the current or net amount of the obligation of the issuing company to the holder."

You have asked my opinion in the following language:—

"We are in doubt as to the construction to be placed on the first sentence of section 1 of chapter 174, and therefore respectfully request your opinion as to whether it is necessary to secure the face amount of such certificates sold, or only the net liability or obligation of the issuing company to the holder."

I answer your inquiry to the effect that it is not necessary, in order to exempt a corporation from the requirements set forth in the first sentence of G. L., c. 174, § 1, that the face amount of the certificates to which you refer should be secured, provided the net liability or obligation of the investment company to the holder be secured by adequate property, real or personal.

The investment of a purchaser in a bond or certificate paid for on the installment plan is, from the very nature of the transaction, less than the face value which may ultimately become, if he continues his payments, the company's liability to him. The investor is adequately protected if at all times the company's net liability to him is secured. To require the company to provide security covering an amount which may never be paid, and much of which will of necessity be paid only in the distant future, would work no reasonable advantage to the investor and would place so great a burden upon the company as to make the carrying on of the business practically impossible. I do not gather an intention upon the part of the Legislature to impose such a burden upon the business of selling bonds and certificates, from the language of the first sentence of said G. L., c. 174, § 1.

Yours very truly,
JOSEPH E. WARNER, *Attorney General*.

Teachers' Retirement Law — Substitute Teachers — Vacation Schools.

A retired teacher, though not eligible to re-employment in that capacity, may be employed as a substitute teacher for less than a full year and as a teacher in a vacation school.

MAY 29, 1930.

DR. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR:— You have asked my opinion upon two questions relative to the Teachers' Retirement Law.

1. As to substitute teachers. In this connection your letter reads as follows:—

"It has come to the attention of the Board that in some cases school committees employ substitute teachers on a per diem basis, the teacher being appointed to serve for a definite period, in some cases the period of employment being for three months, six months or a full school year.

On December 31, 1914, the Retirement Board received an opinion that the law did not apply to substitute teachers employed on a per diem basis.

On April 6, 1925, the Board received an opinion that a retired teacher could not be re-employed as a regular teacher on an annual salary basis but that he might be employed as a substitute, receiving salary on a per diem basis.

The Retirement Board is not sure whether these opinions apply only to short periods of substitute service on a per diem basis, or whether they also apply to substitutes employed on a per diem basis who are appointed with the understanding that they are to be regularly employed for substantial periods, such as three months, six months or a full school year.

If the previous opinions apply only to short periods of substitute service on a per diem basis, what is the maximum period a teacher may be appointed to serve without requiring membership, and the maximum period a retired teacher may be employed on a per diem basis?"

In an opinion of one of my predecessors in office to you, dated December 31, 1914 (IV Op. Atty. Gen. 340), with which I concur, it is held that the Teachers' Retirement Act of 1913 (St. 1913, c. 832) applied only to teachers in regular salaried positions, with the single exception, stated therein, that there are —

"substitute teachers in the Commonwealth who are duly elected as such by the school boards, whose entire time throughout the school year is devoted to teaching, and who are paid a regular salary. Substitute teachers of the last-named class are, in my opinion, entitled to participate in the retirement system, and may, of course, properly become members of the retirement association. This ruling makes the act apply, as above stated, only to teachers in regular salaried positions."

The principle enunciated in the above ruling is equally applicable under the provisions of the present law relating to teachers' retirement, and establishes that anything less than a full school year under the conditions stated in your letter is not a long enough period to require membership in the Teachers' Retirement Association.

You have set forth in the portions of your letter quoted above the substance of an opinion rendered to you by a former Attorney General on April 6, 1925 (VII Op. Atty. Gen. 630). I am of the opinion that although, as held in the opinion of April 6, 1925, a retired teacher may not be re-employed as a "teacher" but may be employed as a substitute teacher, yet he may not be employed for a full school year as a substitute of the class mentioned in the preceding paragraph. I think it is a fair inference from the words used in G. L., c. 32, § 10, as amended, with relation to prohibition of re-employment — "retired from service in the public schools" — not only (as was said in the opinion of April 6, 1925) "that a teacher so 'retired' shall not be re-employed as a regular teacher on an annual salary basis," but also that he shall not be re-employed even as a substitute teacher under conditions such as would subject him to the provisions of the retirement law.

2. As to retirement at seventy in relation to employment in a summer school. In this connection your letter reads as follows: —

"The Board also voted to request your opinion as to whether or not a member whose retirement at the age of seventy is required on August 8, 1930, may voluntarily retire on July 1, 1930, and serve as a regular teacher

in a summer school conducted by a school committee in Massachusetts for the period July 7 to August 15, 1930. If this service is not permitted, may the member defer his retirement until August 8th, when retirement is required, and continue to serve in the summer school until August 15th?"

I assume that by "summer school," as used by you in the last above-quoted extract from your letter, you refer to a vacation school, so called, which falls within the provisions of G. L., c. 71, § 28, which reads:—

"The school committee may establish and maintain schools to be kept open for the whole or any part of the summer vacation; but attendance thereon shall not be compulsory or be considered as a part of the school attendance required by law."

In G. L., c. 32, § 6, with relation to the provisions of said chapter 32 concerning the retirement system for teachers, the word "teacher" is defined as follows:—

"'Teacher', any teacher, principal, supervisor or superintendent employed by a school committee or board of trustees in a public day school in the commonwealth."

The words "public school" are defined in said chapter in the following manner:—

"'Public school', any day school conducted in the commonwealth under the superintendence of a duly elected school committee, also any day school conducted under sections one to twenty-four, inclusive, of chapter seventy-four."

In a very narrow sense it might be said that the vacation school mentioned in said section 28 falls within the definition of "public school" as given in said section 6. I am of the opinion, however, that, read in the light of the whole context of the Teachers' Retirement Law, as set forth in G. L., c. 32, as amended, it was not the intent of the Legislature to embrace a vacation school within the definition of "public school." The whole scheme of the teachers' retirement system is built upon the basis of the normal school year, running from September to June, as applicable to the teacher in the ordinary public school having such a term, with the specific exception of teachers in training schools. There is no mode provided in said chapter 32 by which teachers employed only in such vacation schools, necessarily serving therein but a very small portion of the year, could be brought within the designated plan set up in said chapter 32, section 10, to receive benefits thereunder.

The first statute providing for the establishment of vacation schools, St. 1899, c. 246, was in existence prior to the enactment of the original laws creating the said retirement system. Had the Legislature intended to extend the benefits of the retirement system to teachers in this class of schools, it is only reasonable to suppose that the system would not have been so established as to make their incorporation impossible. The fact that it was so made indicates the legislative intent with which the said definitions were framed, and it cannot well be said that vacation schools, or teachers therein, respectively, are included within them.

Therefore, following the principles laid down in the opinion of the then Attorney General of April 6, 1925, hereinbefore referred to, a teacher retired under the terms of G. L., c. 32, as amended, may serve in a "vaca-

tion school"; and this being so, the date of the retirement of such a teacher, which you refer to in your letter, becomes of no consequence.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Trial Justice — Justice of the Peace — Expiration of Term.

A trial justice may not continue to perform the duties of his office after his term has expired and before the appointment of his successor.

JUNE 11, 1930.

His Excellency FRANK G. ALLEN, *Governor of the Commonwealth*.

SIR: — My opinion is requested on the following question of law: —

"The term of office of the trial justice of Ludlow, Massachusetts, expired on June 8, 1930. G. L., c. 219, § 4, provides, in part, that 'a trial justice shall hold his office for three years from the time of his designation, unless during that period he ceases to hold a commission as justice of the peace or unless such designation and commission as trial justice is revoked.'

Is the trial justice authorized to continue to perform all the duties of his office after his term has expired and until he has been renamed or his successor has been appointed and qualified?"

I am of the opinion that a trial justice is not authorized to continue to perform the duties of a trial justice after his term has expired, with the exception of completing unfinished business already before him, which is specifically provided for by G. L., c. 219, § 13. After his commission has expired by lapse of time his powers do not continue to exist, pending his reappointment or the appointment of his successor.

The history of the creation and existence of trial justices in Massachusetts indicates that they are in reality merely justices of the peace who are in effect specially designated by the Governor to perform certain functions by way of trying certain cases, and that there is no trial justice who is a public officer, within the meaning of those words as used in G. L., c. 30, § 8.

It was pointed out by the Supreme Judicial Court in the case of *Mead v. Bowker*, 168 Mass. 234, 235, that —

"trial justices are simply justices of the peace designated and commissioned to try cases."

And in *Maloney v. Piper*, 105 Mass. 233, 234, the same court said: —

"By the existing statutes of the Commonwealth, all justices of the peace have civil jurisdiction, and a certain number of them are designated and commissioned to try criminal cases, and are styled trial justices."

It follows, then, that when the commission of a justice of the peace, which has been given to him by the Governor to designate him as a trial justice, expires, his authority to act in such a capacity is at an end.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Extradition — Defective Delinquent — Parole.

A defective delinquent may be extradited upon the original complaint, if not finally disposed of, though paroled by a State department to which he has been committed.

JUNE 11, 1930.

Dr. A. WARREN STEARNS, *Commissioner of Correction.*

DEAR SIR: — You have asked my opinion as to the legality of extraditing persons paroled from the departments for defective delinquents who have left the Commonwealth and whose recall has been ordered by the Board of Parole.

U. S. Const., art. IV, § 2, provides, in part, as follows: —

“A person charged in any state with *treason, felony, or other crime*, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.”

G. L., c. 123, § 113, as amended by St. 1928, c. 333, provides as follows: —

“At any time prior to the final disposition of a case in which the court might commit an offender to the state prison, the reformatory for women, any jail or house of correction, the Massachusetts reformatory, the state farm, the industrial school for boys, the industrial school for girls, the Lyman school, any county training school, or to the custody of the department of public welfare, *for any offence* not punishable by death or imprisonment for life, a district attorney, probation officer or officer of the department of correction, public welfare or mental diseases may file in court an application for the commitment of the defendant in such a case to a department for defective delinquents established under sections one hundred and seventeen and one hundred and twenty-four, or to a department for the care and treatment of drug addicts, established by the governor and council under authority of said sections. On the filing of such an application the court may continue the original case from time to time to await disposition thereof. If, on a hearing on an application for commitment as a defective delinquent, the court finds the defendant to be mentally defective and, after examination into his record, character and personality, that he has shown himself to be an habitual delinquent or shows tendencies towards becoming such and that such a delinquency is or may become a menace to the public, and that he is not a proper subject for the schools for the feeble-minded or for commitment as an insane person, the court shall make and record a finding to the effect that the defendant is a defective delinquent and may commit him to such a department for defective delinquents according to his age and sex, as hereinafter provided. If, on a hearing on an application for commitment as a drug addict, it appears that the defendant is addicted to the intemperate use of stimulants or narcotics, the court may commit him to a department for the care and treatment of drug addicts if and when such a department is provided.”

Any defective delinquent who, prior to his or her commitment to a State department for defective delinquents, was before a court charged with the commission of a crime, which charge was not finally disposed of, may, if he or she has left the Commonwealth while on parole from such

a department, be asked for from another jurisdiction on extradition or rendition proceedings after a recall from such parole has been ordered. A request for such extradition or rendition must be based on the original charge of the commission of a crime and not upon the commitment as a defective delinquent.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Teachers' Retirement Law — Assessments — Pensions.

A part-time teacher in the service prior to 1925, who becomes a full-time teacher in 1929, may become a member of the Retirement Association by paying such assessments as she would have paid had she become a member in 1914, and may be considered to have had five consecutive years of service prior to retiring in 1930.

JUNE 16, 1930.

Dr. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR:— You have asked my opinion on the following questions:—

1. A teacher was regularly employed on a part-time basis from September, 1901, to July, 1929, and on a full-time basis from September, 1929, to the present time. She is now sixty-two years old, and, having never joined the Retirement Association, is desirous of joining in order to receive the benefits of the retirement fund. For what periods of service must assessments be paid by the teacher, under section 7 (3) of the retirement law, in order that she may be enrolled as a member of the Retirement Association?

G. L., c. 32, § 7 (3), as amended by St. 1924, c. 263, § 1, and St. 1927, c. 173, reads as follows:—

“Any teacher who entered the service of the public schools before July first, nineteen hundred and fourteen, who has not become a member of the association, may hereafter, before attaining the age of seventy, upon written application to the board, become a member of the association by paying an amount equal to the total assessments, together with regular interest thereon, which he would have paid if he had joined the association on September thirtieth, nineteen hundred and fourteen. Such a teacher may make application for membership and accumulate in the annuity fund in instalments, in accordance with such rules as the board shall adopt, the amount due to join the association, he being enrolled a member of the association when the total amount due on account of back assessments and interest has been accumulated in the annuity fund; provided, that all instalments must be paid before the teacher is sixty years of age. Until the full amount required for membership has been accumulated, a teacher may at any time discontinue payments and withdraw his total contributions with the regular interest thereon. If a teacher dies before said full amount has been accumulated, his total contributions, with regular interest thereon, shall be paid to the person or persons entitled, as if constituting a sum due a deceased member, in accordance with section thirty-three.”

On March 29, 1915, the Attorney General ruled, in an opinion (not published), that part-time teachers were subject to the provisions of the

retirement law. By St. 1925, c. 228, the definition of "teacher" was changed so as to exclude part-time teachers from the operation of the retirement law, and only full-time teachers are included since that act. This act, however, had the important qualification that it should not "affect the rights of any person then enrolled as a member of the state teachers' retirement association."

From the application of G. L., c. 32, § 7 (3), as amended, and the opinion of the Attorney General above referred to we see that this teacher, although a part-time teacher, can join the Teachers' Retirement Association by paying an amount equal to the total of assessments, together with interest thereon, which she would have paid had she joined the association on September 30, 1914.

The only difficulty now is, does the operation of St. 1925, c. 228, preclude the association from levying assessments from September 1, 1925, until September, 1929, when she became a full-time teacher. If she had joined the association on September 30, 1914, the fact that she was only a part-time teacher would not have compelled her to cease from belonging to the association when St. 1925, c. 228, became effective, for by the terms of that act persons already members of the association could continue as members, although only as part-time teachers. Therefore, since G. L., c. 32, § 7 (3), especially provides that any teacher may join the association by paying such assessments, together with interest, as she would have paid had she joined on September 30, 1914, the assessments must be levied to include the period between September 1, 1925, and September 1, 1929. If she had joined on September 30, 1914, St. 1925, c. 228, would have had no effect, and it is my opinion that by the wording of G. L., c. 32, § 7 (3), the fact that she joins now makes no difference.

2. Your next question is: Should this teacher, now a full-time teacher, after joining the association and then retiring receive a pension as provided by G. L., c. 32, § 10 (4), or should she be considered to have had five consecutive years of service preceding retirement and be entitled to receive a pension computed under paragraph 5 of said section?

G. L., c. 32, § 10, (4) and (5), are as follows: —

"(4) Any member receiving payments of an annuity as provided in paragraph (3) of this section, if not rendered ineligible therefor by section fifteen, shall receive with each quarterly payment of his annuity an amount from the pension fund, as directed by the board, equal to the quarterly annuity payment to which he would be entitled if his annuity were figured under clause (a) of paragraph (3) of this section.

(5) Any member who served as a regular teacher in the public schools prior to July first, nineteen hundred and fourteen, and who has served fifteen years or more in the public schools, not less than five of which shall immediately precede retirement, on retiring as provided in paragraph (1) or (2) of this section, shall be entitled to receive a retirement allowance as follows: (a) such annuity and pension as may be due under paragraphs (3) and (4) of this section; (b) an additional pension to such an amount that the sum of this additional pension and the pension provided in paragraph (4) of this section shall equal the pension to which he would have been entitled under sections seven to nineteen, inclusive, if he had paid thirty assessments based on his average yearly rate of salary for the five years immediately preceding his retirement, at the rate of assessment in effect at that time, and his account had been annually credited with interest at the rate of four per cent per annum; . . ."

In my opinion, the ruling on the first question answers this; that is, if assessments are levied for the period from September, 1925, down to date, she must be assumed to have been a member of the association for those five years, for all purposes.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Municipality — City — Date of Establishment.

The date of acceptance by the voters of an act for the establishment of a city is the date of such establishment.

JUNE 19, 1930.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR: — You ask my opinion as to what date is to be considered the legal date of incorporation of a city, and you suggest that “there seem to be three distinct dates under consideration in this question, as follows: (1) The date of the approval of the act of the Legislature; (2) the date of the acceptance of the act by the voters; and (3) the date when the new form of government commences operation after acceptance by the voters.”

As a matter of strict legal interpretation, the Legislature cannot and does not incorporate cities, notwithstanding the use of the term “incorporate” in the titles to some legislative acts establishing cities and of the term “charter” in legislative enactments and in the decisions of the courts relating to matters affecting the several cities in the Commonwealth.

Mass. Const. Amend. II authorizes the General Court to “erect or constitute municipal or city governments, in any corporate town or towns in this commonwealth.”

In an illuminating discussion of article II of the Amendments to the Constitution the Supreme Judicial Court, in *Hill v. Boston*, 122 Mass. 344, 354, said: —

“The article does not speak of granting charters or acts of incorporation, but of ‘erecting and constituting municipal or city governments;’ by the words ‘in any corporate town or towns,’ it clearly shows that the towns are already corporations; and the powers and privileges to be granted are such ‘as the General Court shall deem necessary or expedient for the regulation and government’ of the inhabitants. The article throughout shows that the establishment of a city is deemed to be an act done by the Legislature for the convenient and efficient administration of local government, and not for the purpose of conferring any peculiar benefit on the municipality or its inhabitants.”

The word “incorporate,” as used in connection with cities in this Commonwealth, must be construed to mean “erect,” “constitute,” or “establish.” See titles to earlier acts establishing cities in this Commonwealth, namely, — Boston (St. 1822, c. 110); Salem (St. 1836, c. 42); Roxbury (St. 1846, c. 95); Cambridge (St. 1846, c. 109); New Bedford (St. 1847, c. 60); and Worcester (St. 1848, c. 2).

I therefore advise you that the cities of the Commonwealth were never incorporated as such, but were constituted or established cities for the “convenient and efficient administration” of their local governments.

In direct reply to your communication, I am of the opinion that “the date of acceptance of the act by the voters” is the legal date of the estab-

lishment of a city unless the General Court has clearly provided otherwise in the legislative act authorizing the establishment of such city.

The General Court cannot constitutionally establish a city "unless it be with the consent, and upon the application of a majority of the inhabitants of such town, present and voting thereon, pursuant to a vote at a meeting duly warned and holden for that purpose." (Mass. Const. Amend. II.) See discussion in *Attorney General v. Methuen*, 236 Mass. 564. A legislative act passed for such purpose creates a plan for a new mode of municipal administration in a town. Such act cannot become effective until and unless a majority of the qualified voters of the town have given their "consent" at the time and in the manner prescribed in said act. Pending the adoption of the act establishing a city, the political *status quo* of the town remains in force. *Durant v. Lawrence*, 1 Allen, 125.

The manner in which the affairs of the municipality are to be carried on subsequent to the adoption of the new plan of municipal government is provided in the act. In the "Act Establishing the City of Boston" (St. 1822, c. 110) provision was made that all persons holding town office at the time of the passage of the act should hold their offices until such act went into effect and their successors were chosen and qualified. Subsequent acts establishing other cities contained provisions. The act establishing the City of Gardner (St. 1921, c. 119), one of the most recent enactments of this nature, provided in section 2 that the "selectmen . . . shall in general have the powers and perform the duties of the board of aldermen in cities under the General Laws, . . . and the town clerk shall perform the duties therein assigned to city clerks." It clearly appears that it was the intent of the Legislature, in passing each of the acts mentioned above, that when the inhabitants of those towns had given their "consent" to a change in the mode of municipal administration they immediately thereafter became cities; and that the town officers holding office at the time the change was made would, until the new system of municipal administration was inaugurated, be city officials, *pro tempore*.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Statute — Approval — Effective Date.

A statute, not an emergency law, excluded from the referendum takes effect on the thirtieth day next after the day on which it is approved.

JUNE 19, 1930.

HON. FRANK E. LYMAN, *Commissioner of Public Works*.

DEAR SIR: — You have asked my opinion upon the following question of law: —

"Will you please inform the Department if St. 1930, c. 406, which places the maintenance of the New Bedford-Fairhaven bridge on this Department, is effective within thirty or ninety days from its passage?"

G. L. c. 4, § 1, provides as follows: —

"A statute enacted by the general court which is not subject to a referendum petition shall take effect throughout the commonwealth, unless it is otherwise expressly provided therein, on the thirtieth day next after the day on which it is approved by the governor, or is otherwise passed

and approved, or has the force of law, conformably to the constitution. An act declared to be an emergency law shall, unless otherwise provided therein, take effect upon its passage."

The statute which you have called to my attention may not, in my opinion, be made the subject of a referendum petition, since its provisions fall within the matters specifically excluded from the scope of referendum petitions by Mass. Const. Amend. XLVIII, The Referendum, III, inasmuch as its operation is restricted to "particular districts or localities of the commonwealth," as those words are used in said amendment. The applicable part of said amendment reads:—

"SECTION 2. *Excluded Matters.*—No law that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal or compensation of judges; or to the powers, creation or abolition of courts; *or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth;* or that appropriates money for the current or ordinary expenses of the commonwealth or for any of its departments, boards, commissions or institutions shall be the subject of a referendum petition."

The instant law, St. 1930, c. 406, relates to the particular district or locality between New Bedford and Fairhaven, and to so much only thereof as constitutes the bridge over the Acushnet River.

This act has not been declared to be an emergency law and it is not expressly provided therein that it shall take effect at any other time than the thirtieth day next after the day on which it is approved by the Governor, or is otherwise passed and approved, or has the force of law.

It follows then, from the provisions of G. L. c. 4, § 1, that said St. 1930, c. 406, which appears to have been approved by the Governor on May 28, 1930, takes effect on the thirtieth day next after said May 28, 1930.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Ways — Motor Vehicles — Pedestrians.

A pedestrian has a right to travel on the highways equal to that of the operator of a motor vehicle.

JUNE 26, 1930.

Governor's Committee on Street and Highway Safety.

GENTLEMEN:—For your guidance I desire to call your attention to the case of *Emery v. Miller*, 231 Mass. 243, in which case two pedestrians were walking to the left of the middle of a State highway and were struck by an automobile, which in this instance came from behind them. The court said that the pedestrians "had an indubitable right to be travelling where they were."

It is a general principle of law in this Commonwealth, as laid down in numerous decisions, that the pedestrian has a right to travel on the highways of the Commonwealth equal to that of the operator of a motor vehicle, but that, like the operator, he must use a reasonable degree of care for his own safety and that of others.

The general principle applicable to pedestrians in the use of the highways was laid down in *Hennessey v. Taylor*, 189 Mass. 583, and this has been followed in a number of other cases. In each instance the pedes-

trian is required to use a reasonable degree of care for his own safety, but under ordinary circumstances, where peculiar facts do not exist which require another mode of conduct, it cannot be said that a pedestrian is negligent merely because he is walking on the left side of the road as he is proceeding.

Yours very truly,
JOSEPH E. WARNER, *Attorney General*.

Voter — Party Enrollment — City Clerk.

A voter who is not enrolled in any political party may not have an enrollment established by appearance before a city or town clerk after the primaries.

JUNE 26, 1930.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR:— You have asked my opinion whether, under the provisions of G. L., c. 53, § 38, as amended by St. 1927, c. 110, a voter who is not enrolled in any political party may appear in person before the city or town clerk and have his enrollment established.

G. L., c. 53, § 38, as amended by St. 1927, c. 110, reads as follows:—

“No voter enrolled at a primary shall be allowed to receive the ballot of any political party except that with which he is so enrolled; but he may establish, change or cancel his enrolment by appearing in person before the city or town clerk and requesting in writing to have his enrolment changed to another party, or canceled, and such change or cancellation shall take effect at the expiration of thirty days thereafter. No voter enrolled as a member of one political party shall be allowed to receive the ballot of any other political party, upon a claim by him of erroneous enrolment, except upon a certificate of such error from the registrars, which shall be presented to the presiding officer of the primary and preserved as part of the records of such primary; but the political party enrolment of a voter shall not preclude him from receiving at a city or town primary the ballot of any municipal party, though in no one primary shall he receive more than one party ballot.”

St. 1913, c. 835, § 111, contained substantially the same provisions as G. L., c. 53, § 38. These provisions were repealed by St. 1914, c. 790, § 8, which provides that the names of candidates for nomination of all political parties be placed upon the same ballot, and that no party designations appear upon the voting lists. Gen. St. 1916, c. 179, § 8, repealed St. 1914, c. 790, § 8, and substantially re-enacted the provisions of St. 1913, c. 835, § 111. The provisions of the present section are substantially the same as Gen. St. 1916, c. 179, § 8.

In my opinion, the provisions of G. L., c. 53, § 38, as amended by St. 1927, c. 110, are not applicable to a voter who has not already enrolled in any political party. Provisions for the enrollment in a political party of such a voter are set forth in G. L., c. 53, § 37, as amended. G. L., c. 53, § 38, as amended, provides that “he may establish, change or cancel his enrolment by appearing in person before the city or town clerk and requesting in writing to have his enrolment changed to another party or canceled.” The pronoun “he,” in this sentence, refers only to a “voter enrolled at a primary” under the provisions of G. L., c. 53, § 37, as

amended. The method of availing one's self of the provisions of G. L., c. 53, § 38, as amended, is by a request "in writing to have his enrolment changed to another party or canceled." Inasmuch as the request in writing, provided for in said section 38, relates only to a "change or cancellation" of a party enrollment, the city or town clerk may not, under the provisions of this section, "establish" a party enrollment which is other than a "change or cancellation" of an existing party enrollment.

Yours very truly,
JOSEPH E. WARNER, *Attorney General*.

Local Board of Health — Rules and Regulations — Penalties.

Where a penalty has been established by the Legislature, a local board of health may not set up another by rules and regulations.

JULY 11, 1930.

DR. GEORGE H. BIGELOW, *Commissioner of Public Health*.

DEAR SIR:— You have requested my opinion upon the following questions in connection with rules and regulations of local boards of health:—

"1. Under what statute should rules and regulations of a local board of health be established?

2. Can a board of health fix a penalty for violation of its rules and regulations?

3. If so, is it necessary for a board of health to fix a penalty in its regulations?

4. If so, under what statute should the penalty covering the transportation of garbage, for instance, be made?"

I.

You have stated in your letter: "The question has arisen as to the authority of local boards of health to fix penalties for violation of their rules and regulations."

In so far as your first three questions relate to the general subject as above set forth in your letter, they are of such a character that I should not attempt to answer them categorically.

For your guidance it is suggested with relation to your first question, in its general aspect: G. L., c. 111, as amended, contains several provisions under which rules and regulations may be established by local boards of health, and such rules and regulations may be so established under any other statute, if such there be, which authorizes such action.

As to your second question in its general aspect: A board of health may fix a penalty for violation of such of its rules and regulations as have not already a penalty established for their violation by the Legislature, provided power to establish a penalty, in the absence of the establishment of one by the Legislature, has been authorized by some statutory provision.

As to your third question in its general aspect: It is obvious that if a penalty is desired and there is no penalty prescribed by statute and a local board of health is authorized to establish a penalty, it might be well to do so, and it might be said that such action would be "necessary" if the enforcement of a penalty by criminal procedure to secure punishment of an offender were desired.

II.

You also state in your letter: "The particular question in point is in connection with the transportation of garbage through one of the towns."

Treating your four questions as applicable to the particular subject which you point out, I advise you as follows: —

G. L., c. 111, § 31, as amended by St. 1924, c. 180, and § 31A, as added by St. 1921, c. 358, § 1, read as follows: —

"SECTION 31. Boards of health may make reasonable health regulations. All regulations made by boards of health under this chapter shall be published once in a newspaper published in the town, and such publication shall be notice to all persons.

SECTION 31A. Any person may remove or transport garbage, offal or other offensive substances through the streets; provided that he shall first register with the local board of health, the fee for which registration shall not exceed two dollars; and provided, further, that he shall remove and transport the material herein mentioned in accordance with such reasonable rules and regulations as may be established by the said board."

Section 31A is not a licensing law. It provides only for registration of any person who removes or transports garbage, etc. It contains the provision that such person shall "remove and transport the material . . . in accordance with such reasonable rules and regulations as may be established by the said board." No specific authority is given to boards of health to make rules and regulations, with penalties, under section 31 or section 31A, nor does section 31A purport to give any additional power to make rules and regulations relative to the removal and transportation of garbage, etc., beyond those already possessed by such boards. Prior to the enactment of said section 31A boards of health had authority to make rules and regulations concerning the removal and transportation of garbage as sources of filth and causes of sickness, and there is no reason to say that they have lost such authority by the enactment of section 31, as amended, and section 31A. See *Wheeler v. Boston*, 233 Mass. 275; *Lexington v. Miskell*, 260 Mass. 544; *Swansea v. Pivo*, 265 Mass. 520; VI Op. Atty. Gen. 280.

G. L., c. 111, § 122, provides: —

"The board of health shall examine into all nuisances, sources of filth and causes of sickness within its town, or on board of vessels within the harbor of such town, which may, in its opinion, be injurious to the public health, shall destroy, remove or prevent the same as the case may require, and shall make regulations for the public health and safety relative thereto and to articles capable of containing or conveying infection or contagion or of creating sickness brought into or conveyed from the town or into or from any vessel. Whoever violates any such regulation shall forfeit not more than one hundred dollars."

If rules and regulations for the public health and safety, relative to the removal and transportation of garbage, be made under said section 122, those rules and regulations must be observed by one who has been registered under the provisions of section 31, and for a violation thereof a penalty has been established in said section 122 by the General Court. Since such penalty has been so established for the violation of such rules and regulations, no other one may be made by a local board of health.

As was said by the Supreme Judicial Court in *Southborough v. Boston & Worcester St. Ry. Co.*, 250 Mass. 234, —

“When the Legislature has covered the whole subject there is no room for the exercise of authority by local officers.”

In my opinion, appropriate action may be commenced by a local board of health for the recovery of the forfeiture provided for in G. L., c. 111, § 122, in the event of a violation of a rule or regulation adopted by it thereunder dealing with the subject of removal or transportation of garbage (see *Commonwealth v. E. E. Wilson Co.*, 241 Mass. 406).

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Great Pond — Fishing — Licenses.

A license for fishing must be obtained by one who desires to exercise his right of fishing in a pond other than a great pond.

JULY 11, 1930.

HON. WILLIAM A. L. BAZELEY, *Commissioner of Conservation*.

DEAR SIR:— You request my opinion as to whether a person fishing in a pond other than a great pond, with the consent of a riparian owner, requires a license.

G. L., c. 131, § 5 (St. 1930, c. 393, § 2), requires a license for fishing “in any of the inland waters of the commonwealth.” Section 44 provides that “the riparian proprietors of any pond, other than a great pond, and the proprietors of any pond or parts of a pond created by artificial flowing, shall have exclusive control of the fisheries therein.” “Great pond” is defined in section 1 as “a natural pond the area of which is twenty acres or more.”

In my opinion, a license is required in the case you refer to. The words “waters of the commonwealth,” in section 5, are not to be construed as applying only to great ponds of twenty acres or more. The natural meaning of these words is not changed by the provisions of section 44. The words “exclusive control,” in section 44, refer to the right to exclude the public; they do not confer upon the riparian proprietors the right to permit fishing without a license. See VI Op. Atty. Gen. 430; VII Op. Atty. Gen. 608. (I assume that your question does not relate to a person catching fish artificially propagated, or to a person owning land bordering on the pond and used for agricultural purposes within the exception stated in section 5.)

You also request my opinion as to whether a person such as described in your previous question must comply with all laws relating to open season, number of fish to be taken, and size of fish. In my opinion, such laws must be complied with. I assume that there is no provision in any of the laws to which you refer which limits their application. The phrase “waters of the commonwealth” seems to be commonly used in such laws. See VII Op. Atty. Gen. 608.

You also request my opinion as to whether the requirements as to licenses, seasons, etc., apply to fishing upon ponds controlled by municipalities for water supplies, and where fishing is permitted. I answer this question also in the affirmative. Such ponds are, in my opinion, “waters

of the commonwealth," within the meaning of that phrase as used in the statutes in question.

You also request my opinion as to whether, where the Commonwealth, county or town owns land bordering upon a pond other than a great pond, the public may fish in such pond; and if so, whether the public is confined to fishing from the shores of such publicly owned land, or may fish upon any part of the pond, gaining access through such public land. In my opinion, the public may fish on such a pond and on any part of it, assuming that the owners of other lands bordering on the pond have not obtained exclusive property by making a payment to the public in accordance with the provisions of section 46, which state that "a pond other than a great pond, bounded in part by land belonging to the commonwealth or to a county, city or town, shall become the exclusive property of the other proprietors as to the fisheries therein only upon payment to the state treasurer, or to the county, city or town treasurer, as the case may be, of a just compensation for their respective rights therein, to be determined by three arbitrators."

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Retirement System — Pensioners of a City — Employment.

A legislative commission, half of whose expenses are to be paid by a city, may not employ a person who receives a pension from such city, under G. L., c. 32, § 91.

JULY 14, 1930.

HON. NATHANIEL P. SOWLE, *Chairman, Special Commission Appointed under Chapter 29 of the Resolves of 1930 and Chapter 48 of the Resolves of 1929.*

DEAR SIR: — You have submitted the following question to me: —

"Can this Commission legally employ and pay with funds of the Commonwealth, as authorized by the creative act, an engineer who has been retired by the city of Boston and who receives a pension from said city?"

By said chapter 29 of the Resolves of 1930 your Commission, among other matters, is authorized to —

"employ such engineers, experts and others as it may deem necessary, and may expend for the purposes of this resolve such sum, not exceeding two thousand dollars, as may be appropriated by the general court, in addition to the unexpended balance of the amount appropriated for such investigation by item six hundred and fifty-six *b* of chapter three hundred and eighty-six of the acts of nineteen hundred and twenty-nine."

It is also provided, however, in said resolve as follows: —

"The city of Boston shall reimburse the commonwealth for one half of the expense incurred under said appropriations."

With relation to a former employee of the city of Boston who is drawing a pension from said city, such as the engineer referred to in your question (and I assume that said engineer has received the first payment upon his pension), G. L., c. 32, § 91, prohibits his receiving from said city any payment for service rendered to the city. G. L., c. 32, § 91, reads: —

"No person while receiving a pension or an annuity from the commonwealth, or from any county, city or town, except teachers who on March thirty-first, nineteen hundred and sixteen, were receiving annuities not exceeding one hundred and eighty dollars per annum, shall, after the date of the first payment of such annuity or pension, be paid for any service rendered to the commonwealth, county, city or town which pays such pension or annuity, except for jury service or for service rendered in an emergency under section sixty-eight, sixty-nine or eighty-three, or for service in a public office to which he has been elected by the direct vote of the people."

In view of the fact that the work which the Commission is to do under the provisions of said resolves is obviously intended to be of benefit both to the Commonwealth and to the city of Boston, and that the expenses thereof are directed by the Legislature to be paid in equal parts by the city and the Commonwealth, it would require a very strained construction of said chapter 29 of the Resolves of 1930 to enable one to hold that a former employee of the city, although directly employed by your Commission, was not, while in such employment, rendering service to the city, more especially as it would seem that one-half his compensation may be required to be paid by the city.

G. L., c. 32, § 91, is a law of general application as regards its subject matter, and in substance had been on our statute books for many years before the passage of either of said resolves; and it is not reasonable to believe that in passing the said resolves the Legislature was not mindful of the said law, or intended to change its general terms by implication to be made under an actually narrow interpretation of the terms of the said resolves.

I am of the opinion that the employment by your Commission of the retired, pensioned city employee to whom you refer in your communication is not one which you can lawfully make.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Lord's Day — Sports — Amusements — License.

Miniature golf courses, golf ranges, airports and pony rides, to be operated on Sunday, are not to be licensed under the Sunday Sports Law, but, when operated on the Lord's Day, must be licensed as "public entertainment," under G. L., c. 136, § 4.

JULY 28, 1930.

GEN. ALFRED F. FOOTE, *Commissioner of Public Safety*.

DEAR SIR: — You request my opinion as to whether licenses under G. L., c. 136, § 4 (as amended), are required for conducting on Sunday certain amusement enterprises, which may be described as miniature golf courses, golf driving ranges, airports and pony rides. The proprietors of these establishments invite the public, upon payment of an admission fee, to participate in the form of amusement provided.

The question is whether, if licensed, these activities are to be licensed under section 4 of G. L., c. 136, or under the so-called Sunday Sports Law, St. 1928, c. 406 (G. L., c. 136, §§ 21 *et seq.*).

Section 4 of G. L., c. 136, provides for licensing the conduct of any "public entertainment" after one o'clock in the afternoon on Sunday,

provided the mayor of a city or the selectmen of a town and the Commissioner of Public Safety find that such entertainment is in keeping with the character of the day.

St. 1928, c. 406, makes it lawful (in cities and towns which have accepted the act) to take part in or witness any "athletic outdoor sport or game" on Sunday between two and six o'clock in the afternoon, provided a license for the conduct of such sport or game is obtained from a city council, with the approval of the mayor, or from the selectmen of towns. Admission fees may be charged.

In my opinion, the activities to which you refer are not of the class embraced in the act of 1928. (See also St. 1920, c. 240; G. L., c. 136, §§ 21 *et seq.*) They lack the element of contest, which I think is involved in the words used in the act of 1928. In any event, to construe this act as applicable would involve, in my opinion, an unnatural use of language, and would achieve a result which was not intended. The enterprises named in your question, therefore, cannot be conducted unless their proprietors are entitled to obtain, and do obtain, licenses for conducting them as "public entertainment," under section 4 of G. L., c. 136.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Insurance — Service Contract — Medical Service.

A contract to provide medical service for a given period, to a stated maximum amount in value, is a contract of service, not of insurance.

SEPT. 8, 1930.

HON. MERTON L. BROWN, *Commissioner of Insurance*.

DEAR SIR: — You have requested my opinion as to whether a certain contract of the Universal Medical Fund Company, wherein the contract holder is to be provided by the company with medical service, is a contract of insurance.

The definition of an insurance contract is given by G. L., c. 175, § 2, as follows: —

"A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent, or to do an act valuable to the insured, upon the destruction, loss or injury of something in which the other party has an interest."

It is to be noted that in the contract we are considering, in accordance with the exact wording of this contract, the contract holder "is to be provided by the Company with medical service not to exceed in amount . . . \$100.00 per annum, during the continuance of this Certificate."

It has long been accepted that a company may agree, for a consideration, to furnish services for a definite period in the future. Such a contract has been considered to be a contract of service rather than of insurance. There are opinions of several of my predecessors to that effect. See I Op. Atty. Gen. 544; II Op. Atty. Gen. 226; V Op. Atty. Gen. 206.

Your letter, however, states: —

"Under this contract the holder is entitled to be treated by any physician whom he may select and the corporation will reimburse him for the cost thereof up to an amount not exceeding \$100. per annum."

Such an agreement as described by this statement is not an agreement to furnish services, but, rather, one to reimburse the contract holder for certain charges which he may be obliged to pay, and would be a contract of insurance. I do not find any such provision for reimbursement in the copy of the contract submitted. In this contract the provision is for the furnishing of medical services.

I am therefore of the opinion that this contract is not a contract of insurance, but, rather, a contract of service.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Question of Public Policy — Submission to Voters.

A question as to instructions to a representative, relative to unemployment insurance, is a question of "public policy."

SEPT. 10, 1930.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR:— You request me to consider an application for submission to the voters of the Sixth Bristol Representative District at the next State election of the following question of instructions to the representative from said district:—

"Shall the representative from this district be instructed to vote in favor of part pay for the unemployed through a system of unemployment insurance?"

Under the provisions of St. 1925, c. 97, you request me to determine whether or not the aforesaid question is one of public policy.

I hereby determine that the said question is one of public policy.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Question of Public Policy — Submission to Voters.

A question as to instructions to a representative relative to a legislative request to the President and the United States Senate, relating to the League of Nations, is one of "public policy."

SEPT. 10, 1930.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR:— You request me to consider an application for submission to the voters of the Twenty-first Middlesex Representative District of the following question of instructions to the representative from said district:—

"Shall Malden's representative in the General Court be instructed to vote to request the President and the United States Senate to enter into full co-operation and membership in the League of Nations, with the explanatory reservation that the United States shall not engage in war with any nation, except by vote of Congress, as provided in the United States Constitution, and such other reservations as they deem wise?"

The question involves steps to be taken by the duly elected representative of the aforesaid district to bring about the presentation of a resolution memorializing the President and Senate of the United States, with

the object of bringing the United States into full co-operation and membership in the League of Nations, with certain reservations.

A similar question was determined by one of my predecessors in office, in a communication to you on September 9, 1926 (not published), to be a question of public policy, and I hereby determine the aforesaid instant question to be one of public policy.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

State Highways — Municipalities — Through Way.

Under G. L., c. 89, § 9, as amended, a municipality may not designate any part of a State highway as a "through way."

SEPT. 17, 1930.

HON. FRANK E. LYMAN, *Commissioner of Public Works*.

DEAR SIR: — You have asked my opinion relative to the right of a city or town to designate any part of a State highway as a through way.

The pertinent part of G. L., c. 89, § 9, as amended by St. 1928, c. 357, § 5, is as follows: —

"For the purposes of this section, the department of public works may from time to time designate any state or other highway or part thereof as a through way, and may after notice revoke any such designation; and any city or town may, with the approval of said department and while such approval is in effect, designate any way or part thereof within its control as a through way and may, after notice and like approval, revoke any such designation."

In the original enactment of G. L., c. 89, § 9, the power to designate through ways could only be exercised by the Division of Highways of the Department of Public Works, and then only over State highways. The amendment of 1928, however, extended the right of the Department of Public Works to designate as through ways any highway or part thereof, and gave to a city or town the right to designate as a through way any way or part thereof under the control of the city or town. It is plain, therefore, that the city or town is limited in the exercise of the power to such ways as are under the control of that particular city or town.

When the Revised Laws were in effect, section 11 of chapter 47 expressly provided with regard to State highways that the State department should "exercise complete and permanent control over such highways." While this particular provision was dropped from the statute in the codification of the laws relating to highways, which was enacted as part I of chapter 344 of the General Acts of 1917, it was still apparent from the entire chapter that the State department retained general control and supervision over these ways. It is clear that now, under G. L., c. 81, and the amendments of the various sections of this chapter, that a city or town has only limited rights and obligations with regard to State highways (such as to exercise police jurisdiction, to make necessary temporary repairs and, under certain conditions, to care for snow removal on these highways), and that it has no control over State highways, within the meaning of the word "control" as used in said G. L., c. 81, § 9, as amended.

I therefore answer your question that the city or town has no power to designate any State highway or part thereof as a through way.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Jurors — Disability — Fees.

A juror excused from service on account of physical disability or illness is not entitled to a fee except by special order of the court.

SEPT. 19, 1930.

HON. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR: — You request my opinion as to whether the words “statute cause” as used in Rule 66 of the Superior Court, relating to fees of jurors, apply to cases where jurors are excused on account of illness or physical disability.

The provision in Rule 66 to which you refer is as follows: —

“Persons summoned as jurors, who are excused for any statute cause, shall be entitled to their fees for travel and attendance; but if excused for any other cause or if service is deferred, it shall be on condition that no fee shall be allowed where no service is rendered; unless, in any special case, the court otherwise directs.”

The only statutory exemptions from jury service are those set forth in G. L., c. 234, § 1; and no exemption because of physical infirmity is there provided for. The power of the court to excuse because of physical disability is a common-law power and not statutory.

It follows, therefore, that under Rule 66 no juror excused on account of physical disability is entitled to his fees unless the court makes an order that he be paid.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Divorce — Libellant — Remarriage.

A person from whom a divorce has been granted may not remarry within two years even if the libellant dies within such period.

SEPT. 24, 1930.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR: — You have asked my opinion as to whether or not a person from whom a divorce has been granted in this Commonwealth may marry again within the two-year period mentioned in the applicable statute if the party to whom the divorce was granted has died between the time the decree of divorce became absolute and the expiration of the two-year period.

Inasmuch as the statute itself is silent as to the effect of the death of the libellant within the two-year period, it is necessary to consider the principles of law relating to the right of a libelee to remarry, and the history of the legislation in Massachusetts relating to remarriage after divorce.

The applicable statute, G. L., c. 208, § 24, reads as follows: —

“After a decree of divorce has become absolute, either party may marry again as if the other were dead, except that the party from whom the divorce was granted shall not marry within two years after the decree has become absolute.”

So far as I am aware, the precise question which you propound has never been determined by the Supreme Judicial Court of Massachusetts nor by any court of last resort in any State which has a similar statute.

There are many reported cases, however, in which a libelee has married again within the two-year period while a libellant was still alive, and such marriages have been held in Massachusetts to be void. *Googins v. Googins*, 152 Mass. 533; *Commonwealth v. Josselyn*, 186 Mass. 186; *Murphy v. Murphy*, 249 Mass. 552; and *Wright v. Wright*, 264 Mass. 453.

In these cases the court has treated as void marriages made in violation of the two-year inhibition, and has held that the good faith of an innocent party to such marriage did not bring the same within the provisions of G. L., c. 207, § 6, which, under other circumstances, would have made it valid by reason of the good faith of the innocent party. *Wright v. Wright*, *supra*. The court has held that, although the innocent party did not know of the impediment created by the prohibition of remarriage, made by force of the instant statute (G. L., c. 208, § 24), and though the parties continued to live together as man and wife after the expiration of the two-year period, the marriage could not be regarded as legal even after such expiration of time, but was void.

It seems plain that the instant statute is in the nature of a penal statute imposing a restraint on the guilty party to a divorce. The Supreme Judicial Court said, in *Chase v. Chase*, 191 Mass. 166, 167, speaking of R. L., c. 152, § 21, which immediately preceded G. L., c. 208, § 24, "the purpose of the statute is to prevent the guilty party, after a divorce, from speedily forming a new matrimonial alliance." This being so, it is of no consequence that a libellant has died before the expiration of the two-year period, as regards the restraint placed upon a libelee. That the public policy of this Commonwealth, as expressed in legislative enactments, has been to penalize the guilty party to a divorce is to be seen by reference to the earlier statutes relating to the subject. Thus, St. 1841, c. 83, and G. S., c. 107, § 25, forbade the guilty party to a divorce to contract another marriage during the life of the libellant, without leave of the court, on pain of being adjudged guilty of polygamy. In a prosecution for bigamy under the latter statute, in *Commonwealth v. Lane*, 113 Mass. 458, the court held that the provisions of the latter statute did not create a permanent incapacity to marry again, like an incapacity arising from consanguinity or affinity, but its terms were rather in the nature of the imposition of a penalty, though a penalty to which it was impossible to give extraterritorial operation. In *Commonwealth v. Putnam*, 1 Pick. 136, 139, the court held that under St. 1784, c. 40, an earlier act virtually prohibiting remarriage by the guilty party to a divorce for adultery, a divorce *a vinculo* resulted in a complete dissolution of the marriage tie in Massachusetts "notwithstanding the restraints imposed upon the husband, he being the guilty cause of the divorce." In *West Cambridge v. Lexington*, 1 Pick. 506, 508, Parker, C.J., said of this statute (St. 1784, c. 40): —

"The evident intent of the legislature was to punish a second marriage, by a person who had been before married, the other party to such marriage being alive; excepting from the penalty of the statute only such as had procured a divorce on account of the criminal conduct of the party with whom they had been connected in marriage."

It is to be noted that under the earlier statutes the disability existed as long as the libellant was alive, unless the court should grant permission for the remarriage of the libelee, and that the penalty was to be imposed only when the libelee was guilty of adultery. By St. 1881, c. 234, § 4, the Legislature made a change in the law (embodied also in the instant statute) and provided the present provisions, which imposed a penalty on the

libelee for two years instead of during the lifetime of the libellant, and made it applicable to other causes for divorce in addition to adultery. This appears to have been done in order to restrain the libelee from marriage for a period of only two years from the entry of the final decree, but as the period of restraint was shortened the Legislature made no provision for further curtailing it in the event of the death of the libellant. In other words, where formerly the libelee could not marry again during the lifetime of the libellant without leave of court, by the newer statutes he was prohibited from remarrying for two years. The length of time in which he could not remarry was by the newer statutes made a certainty, as opposed to the previous uncertainty arising from the length of time in which the libellant might live and the difficulty the libellant might be put to in proving to the court at any given time that he was a fit person to re-undertake the responsibilities of marriage. By such a radical change in the law the Legislature made the death of the libellant an immaterial factor, and imposed the two-year prohibition.

It is my opinion, therefore, that the death of the libellant within the two-year period named in the instant statute does not entitle the libelee to remarry before the expiration of such two-year period.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Civil Service — Department of Public Utilities — Division of Smoke Inspection — Employees.

Employees in the Division of Smoke Inspection of the Department of Public Utilities are under civil service.

OCT. 6, 1930.

HON. HENRY C. ATTWILL, *Chairman, Department of Public Utilities*.

DEAR SIR:— You request my opinion as to whether the authority of the Commission under St. 1930, c. 380, to appoint inspectors, assistants and other employees to serve in the Division of Smoke Inspection, is subject to civil service. This statute provides:—

“The commission may employ such inspectors, assistants and other employees to serve in said division as may be necessary.”

In my opinion, appointments made under the authority of this statute must be made under civil service. Appointive positions in the government of the Commonwealth are presumptively under civil service. See IV Op. Atty. Gen. 619; VI Op. Atty. Gen. 152.

There is nothing in said chapter 380 to indicate that the Legislature intended to exclude from the general rule the positions referred to.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Soldiers' Relief — Widow of a Veteran — Remarriage.

The widow of a veteran is not entitled to receive the benefits provided by St. 1929, c. 340, after her remarriage.

OCT. 14, 1930.

MR. RICHARD R. FLYNN, *Commissioner of State Aid and Pensions*.

DEAR SIR:— I am in receipt of your request for my opinion as to whether or not on certain stated facts a woman applying for hospital aid or home care, under St. 1929, c. 340, is to be considered the widow of a

veteran, and therefore entitled to receive such benefits. You state the facts to be as follows:—

“This widow first married a Civil War veteran, who served in a Vermont regiment during the Civil War between 1861 and 1865. The veteran deceased on October 16, 1880. The widow again married a civilian on December 21, 1889, and he died in Boston, April 16, 1917.”

St. 1929, c. 340, provides:—

“Chapter one hundred and fifteen of the General Laws is hereby amended by adding at the end thereof, under the caption, ‘HOSPITAL OR HOME CARE’, the following new section:— *Section 25.* The commissioner shall expend such sum as he deems necessary to provide special care in a hospital or at home for persons who served in the army or navy of the United States in the war of the rebellion and received an honorable discharge from all enlistments therein, their wives and widows, who are in need of such care and who were legally settled in a town of this commonwealth on January first, nineteen hundred and twenty-nine. The amount expended by the commissioner under this section shall be paid from such appropriation as may be made for the purpose. One half of such expense shall be assessed, collected and paid over by the town of the beneficiary’s settlement to the state treasurer in the same manner and at the same time as state taxes. The person charged with disbursing military aid or soldiers’ relief in each town shall, within three days of receiving an application for relief under this section, notify the commissioner of such application upon blanks approved by him. Any person charged with such disbursement who refuses or unreasonably neglects to give notice required by this section within the time and substantially in the form herein required shall be punished by a fine of twenty-five dollars.”

Webster’s dictionary defines a widow as “a woman whose husband is dead and who remains unmarried.” The definition in Bouvier’s law dictionary of a widow is “an unmarried woman whose husband is dead.” In a number of States where the word “widow” has been defined by the court, the definition follows closely that of Webster’s dictionary and Bouvier’s law dictionary. *Inslee v. Rochester & Syracuse R.R. Co., Inc.*, 213 N. Y. S. 6; *Whittlesey v. Seattle*, 94 Wash. 645; *In re Application for Support of Minor Children*, 164 Iowa, 208.

In this Commonwealth it is established that a devise to a widow “during her widowhood” will be terminated by her later marriage. *Dole v. Johnson*, 3 Allen, 364; *Loring v. Loring*, 100 Mass. 341.

In *Guardians of the Poor of Amersham v. Guardians of the Poor of London*, 20 Q. B. D. 103, it was decided that a child whose father had died ceased to have a widowed mother when her mother married again.

In an opinion from this Department to your predecessor in office, under date of August 19, 1909 (not published), the question of the meaning of the word “widow” being then considered, it was stated “that her second marriage ended once and for all her status as the widow of the soldier husband, and that the status is not revived for any purpose by the death of the second husband.”

I am of the opinion, therefore, that on the facts stated the applicant ceased to be the widow of a veteran upon her second marriage, and that she is not eligible to receive the benefits provided for by St. 1929, c. 340.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Local Board of Health — Town Clerk — Burial Permits.

A town clerk has authority to issue burial permits in a town having no elective board of health.

Oct. 16, 1930.

Dr. GEORGE H. BIGELOW, *Commissioner of Public Health.*

DEAR SIR:— You have asked my opinion on the following question: In a town having no elective board of health is the town clerk empowered to issue burial permits, or should burial permits only be issued by the selectmen acting as a board of health?

The statute covering the issuance of burial permits is G. L., c. 114, § 45, as finally amended by St. 1927, c. 48. The pertinent provisions of this statute are as follows:—

“No undertaker or other person shall bury or otherwise dispose of a human body in a town . . . until he has received a permit from the board of health or its agent appointed to issue such permits, or if there is no such board, from the clerk of the town where the person died.”

The question resolves itself into a matter of interpretation as to the meaning of the words “board of health” in this statute. In my opinion, these words, “board of health,” mean an elective board of health rather than the board of selectmen acting as a board of health where the town has made no provision for a board of health.

Every town in the Commonwealth must have a board of selectmen, but it is not essential that each town shall have a board of health. G. L., c. 41, § 1, provides that if a town does not provide for a board of health the selectmen shall act as a board of health. Therefore, if in that portion of G. L., c. 114, § 45, as amended, quoted above, the words “board of health” are interpreted so as to mean the board of selectmen acting as a board of health, where the town has made no provision for a board of health, then the language of the statute authorizing the town clerk to issue burial permits if there is no board of health is meaningless, for, as pointed out, there is always a board of selectmen which is to act as a board of health when there is no elected board. A construction of the words “board of health,” as used in the portion of said section 45 quoted above, which will give meaning to the whole of such portion is that of an elective board of health. It will then follow from such construction that where there is no elective board of health a town clerk has authority, as such, to issue burial permits, and he will not need to be appointed agent for that purpose by a board of selectmen acting as a board of health.

I am not unmindful of the terms of G. L., c. 111, § 1, which provide that “board of health,” as used in that chapter, “shall include the board or officer having like powers and duties in towns where there is no board of health.” This definition of “board of health” in chapter 111, by the language of the act itself, is restricted solely to chapter 111 and cannot be carried over and made applicable to chapter 114.

Upon the foregoing considerations I am constrained to advise you that in a town having no elective board of health the town clerk has authority to issue burial permits.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Soldiers' Relief — Children of Veterans — Remarriage of Mother.

Children of a deceased veteran who had a settlement in this Commonwealth are entitled to the benefit of soldiers' relief, under G. L., c. 115, §§ 17 and 18, even if their mother has been remarried to a man able to support them.

Oct. 16, 1930.

MR. RICHARD R. FLYNN, *Commissioner of State Aid and Pensions.*

DEAR SIR: — You request my opinion as to whether or not under certain stated facts children are entitled to receive soldiers' relief. The facts in the question asked, as they appear in your letter, are as follows: —

"A widow of a legally settled veteran living in this State has been receiving soldiers' relief on the service of her husband during the World War. This widow recently remarried a civilian, and claims soldiers' relief for the support of the veteran's children under the age of 16. Under the provisions of G. L., c. 115, §§ 17 and 18, are said children entitled to soldiers' relief consideration for their support, whether or not the civilian husband of the mother is financially able to support them?"

The pertinent part of section 17 of G. L., c. 115, as amended by St. 1927, c. 308, provides: —

"If a person who served in the army or navy of the United States in the war of the rebellion, in the army, navy or marine corps in the war with Spain or the Philippine insurrection between April twenty-first, eighteen hundred and ninety-eight, and July fourth, nineteen hundred and two, or in the army, navy or marine corps in the world war and received an honorable discharge from all enlistments therein, and who has a legal settlement in a town in the commonwealth, becomes from any cause, except his own criminal or wilful misconduct, poor and wholly or partly unable to provide maintenance for himself, his wife or minor children under sixteen years of age or for a dependent father or mother, or if such person dies leaving a widow or minor children under sixteen years of age, or minor children over sixteen but under eighteen years of age who attend school or are incapacitated for work, or a dependent father or mother without proper means of support, such support as may be necessary shall be accorded to him or his said dependents by the town where they or any of them have a legal settlement; . . ."

It is apparent that provision is made under this statute for these surviving children, they being under sixteen years of age. The status of these children, in so far as the requirements of the statute are concerned, was not changed by the later marriage of their mother. The stepfather is under no legal obligation to support them. *Coakley's Case*, 216 Mass. 71. It would follow, therefore, that it is immaterial whether or not the stepfather is financially able to support them.

The purpose of the Legislature in enacting this statute was to provide for the support of these children, should they need it, as a recognition of the service rendered by their father to the Nation in time of need. IV Op. Atty. Gen. 613.

I am of the opinion, therefore, that these children, if they are without proper means of support, are entitled to the benefit of soldiers' relief, even if their mother has married again and the financial condition of her husband is such that he would be able to support them.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Military Service — Discharge — Gratuity.

A former soldier who received an honorable discharge, but who re-enlisted and thereafter received an "undesirable discharge," is not entitled to a gratuity under Gen. St. 1919, c. 283.

OCT. 17, 1930.

HON. JOHN W. HAIGIS, *Treasurer and Receiver General.*

DEAR SIR: — You request my opinion as to whether a gratuity under Gen. St. 1919, c. 283, should be granted to an applicant who enlisted in the service September 10, 1914, received an honorable discharge September 9, 1918, re-enlisted September 10, 1918, deserted July 5, 1919, was given an undesirable discharge August 31, 1927, and made application for the gratuity on or about September 13, 1930.

Section 2 of the act, so far as is here material, provides that the gratuity be paid to those "who served during the war." But this is qualified by section 5, which provides that "no person shall be eligible for any benefit accruing under this act who . . . shall have received a dishonorable discharge from the service of the United States."

The present applicant seems to fall within this disqualification. Although his discharge for desertion is termed in your letter an "undesirable discharge," nevertheless it is, in my opinion, a dishonorable discharge within the meaning of section 5. See V Op. Atty. Gen. 405. The fact that this discharge was given subsequently to the passage of the act is immaterial. The words "shall have" in section 5 include the future. It seems immaterial that the applicant had previously received an honorable discharge, inasmuch as the statute expressly disqualifies one who has received a dishonorable discharge.

Moreover, the discharge referred to by the statute seems to be a last or final discharge. Thus in section 4 of the act, relating to time of filing applications, reference is made to applicants whose "final discharge from service" is received after the passage of the act. (Cf. St. 1927, c. 206, abolishing the time limit originally established.) The present applicant was in the service at the time of the passage of the act (July 3, 1919), and it would seem, therefore, that his right to make application could accrue under section 4 only upon his final discharge from that service. That discharge, when obtained, was dishonorable.

It is my opinion that the present applicant is not entitled to the gratuity.

Yours very truly,

JOSEPH E. WARNER, *Attorney General.*

Insurance — Domestic Stock Company — Increase of Capital Stock.

A domestic stock insurance company may not vote to increase its capital stock simultaneously by a stock dividend and by an issue of additional stock for cash.

Such a company may make such an increase prior to an approval of its certificate of issuance.

The holder of a certificate of stock representing an increase in capital stock is a stockholder, and entitled to dividends.

Only one certificate of approval of an increase of capital stock may be issued with relation to such increase.

An increase in capital stock may not be returned as paid-up capital in a company's annual statement prior to its approval.

OCT. 17, 1930.

Hon. MERTON L. BROWN, *Commissioner of Insurance.*

DEAR SIR: — You have in a letter to me set forth the following facts: —

“A domestic stock company . . . has voted to increase its capital under said section 70, in part by declaring a stock dividend and in part by issuing additional shares of stock for cash.

An examination of the company indicates that certain persons, who have purchased some of the new shares for cash, have been voting at meetings of the company and have received dividends thereon, although the certificate of company required by said section has not been filed with the Commissioner for his approval.

The said company has made application to the Commissioner that it be permitted now to file with him for his approval under said section 70 a certificate evidencing the issue of stock certificates to an aggregate amount less than the full amount of the proposed increase and to file further certificates with him as additional shares of stock are issued.”

You have asked me the following questions of law relative to such facts: —

“1. May a domestic stock insurance company under said section 70 vote to increase its capital stock simultaneously by both of the methods permitted by said section, that is, may an increase of any amount be effected in part by a stock dividend and in part by issuing additional shares for cash?

2. May such a company lawfully issue stock certificates representing the amount of the increase in its capital stock, in whichever mode it is made, prior to the Commissioner's approval of the company's certificate required by said section 70?

3. If certificates are issued prior to the filing of the said certificate with the Commissioner and the endorsement of his approval thereon, —

(a) Is a holder of such certificates a stockholder, with all the rights and privileges thereof, or simply a creditor?

(b) May the company lawfully pay dividends on shares issued as aforesaid?

4. May the Commissioner, under said section 70, in any case, lawfully approve a certificate or certificates filed with him by the company showing that shares of stock have been issued to an amount less than the amount of the proposed increase, or does said section require or permit the approval of one certificate, and that only after all the stock certificates covering the full amount of the proposed increase have been issued?

5. May such a company, in returning the annual statement required by said section 25, include in the amount of its paid-up capital stock the amount of any stock certificates issued by it in connection with an increase of its capital stock, prior to the Commissioner's approval of the company's certificate required by said section 70?”

1. The applicable statute, G. L., c. 175, § 70, as amended by St. 1924, c. 450, § 8, reads as follows: —

“Such company may issue pro rata to its stockholders certificates of any portion of its actual net surplus it may decide to divide, which shall be deemed to be an increase of its capital to the amount of such certificates, or such company may, at a meeting called therefor, vote to increase the amount and number of shares of its capital stock, and to issue certificates thereof

when paid in full. If a company shall vote to increase its capital in the second of the two ways set forth in this section, the directors shall fix the price, not less than par, at which, and the time, not less than thirty days after the date of such vote to increase, within which the new stock may be taken by the stockholders. And the directors shall forthwith give written notice to each stockholder who was such at the time of the vote to increase, stating the amount of the increase, the number of shares or fractions of shares of new stock that such stockholder is entitled to take, the price at which and the time within which such new stock may be taken. Within said time each stockholder may take, at the price fixed as aforesaid, his proportion of such new shares at the date of such vote to increase. If at the expiration of such time any shares remain untaken, the directors may sell the same for the benefit of the corporation in such manner and for such price, not less than the price fixed as aforesaid, as they may determine. In whichever mode the increase is made, the company shall, within thirty days after the issue of such certificates, submit to the commissioner a certificate setting forth the proceedings thereof and the amount of such increase, signed and sworn to by its president and secretary and a majority of its directors. If the commissioner finds that the increase is made in conformity to law, he shall endorse his approval thereon; and upon filing such certificate so endorsed with the state secretary and the payment of a fee of one twentieth of one per cent of the amount by which the capital is increased for filing the same, the company may transact business upon the capital as increased, and the commissioner shall, upon payment of the fee prescribed by section fourteen, issue his certificate to that effect."

Prior to 1887, provisions for the increase of capital stock of a domestic insurance company in substantially the first manner mentioned in the instant statute were set forth in P. S., c. 119, § 62. Provisions for the increase of capital stock in substantially the second manner mentioned in the instant statute were likewise set forth in sections 70 and 71 of said chapter 119. In each instance a certificate of the Commissioner was required with relation to the increase of capital stock made under either of the two sections (§§ 62 and 70).

St. 1887, c. 214, repealed P. S., c. 119, and combined in one section (§ 36) the provisions of P. S., c. 119, §§ 62, 70 and 71. This new section read:—

"Any such company may issue pro rata to its stockholders certificates of any portion of its actual net surplus it may deem fit to divide, which shall be deemed to be an increase of its capital to the amount of such certificates. And such company may, at a meeting called for the purpose, vote to increase the amount and number of shares of its capital stock, and to issue certificates thereof when paid for in full. In whichever mode the increase is made, the company shall within thirty days after the issue of such certificates submit to the insurance commissioner a certificate setting forth the amount of the increase, and the facts of the transaction signed and sworn to by its president and secretary and a majority of its directors. If the commissioner finds that the facts conform to the law, he shall indorse his approval thereof, and, upon filing such certificate so indorsed with the secretary of the Commonwealth, and the payment of a fee of five dollars for filing the same, the company may transact business upon the capital as increased, and the commissioner shall issue his certificate to that effect."

St. 1894, c. 522, repealed said St. 1887, c. 214, but re-enacted section 36 of said chapter 214 in the language of said section 36, and began a new

paragraph with the words "in whichever mode," which continued to the end of the chapter.

In the codification of the statutes made by the Revised Laws, St. 1894, c. 522, was re-enacted in the following form, the word "*and*" connecting the two modes provided for increasing capital stock, but with the words "in whichever mode," applying to the making of the increase, being changed to "however the increase is made."

R. L., c. 118, § 36, reads as follows:—

"Such company *may issue pro rata* to its stockholders certificates of any portion of its actual net surplus it may decide to divide, which shall be deemed to be an increase of its capital to the amount of such certificates, *and such company may*, at a meeting called for the purpose, vote to increase the amount and number of shares of its capital stock, and to issue certificates thereof when paid for in full.

However the increase is made, the company shall, within thirty days after the issue of such certificates, submit to the insurance commissioner a certificate stating the amount of the increase and the facts of the transaction, signed and sworn to by its president and secretary and a majority of its directors. If the commissioner finds that the facts conform to the law he shall indorse his approval thereof; and, upon filing such certificate so indorsed with the secretary of the commonwealth and the payment of a fee of five dollars for filing the same, the company may transact business upon the capital as increased and the commissioner shall issue his certificate to that effect."

The provisions of R. L., c. 118, § 36, were re-enacted in St. 1907, c. 576, § 39, which repealed R. L., c. 118, but re-enacted without change the words of the earlier section 36.

St. 1912, c. 396, amended said St. 1907, c. 576, § 39, by prescribing details as to the manner in which a company should proceed in increasing its capital stock in the second manner provided for in the earlier statutes, setting forth the whole section in a single section but retaining the word "*and*" before the authorization of the use of the second manner of making an increase, and retaining the words "*however the increase is made*" with relation to the duty of filing a certificate.

In the compilation of the statutes in the General Laws said section 39 appears in chapter 175 as section 70, and for the first time in the history of this portion of the insurance laws the word "*or*" is substituted for "*and*" before the description of the second manner of making an increase of capital stock. The revision also substituted the phrase "*in whichever mode the increase is made*," as used in said St. 1894, c. 522, for the phrase "*however the increase is made*," first employed in the codification of R. L., c. 118, § 36. No change applicable to the questions before me was made by the amendment of 1924.

I have reviewed the history of this legislation in part for the purpose of ascertaining what light it throws upon the meaning of the word "*or*" as used in the instant statute, which meaning must be ascertained in order to answer your first question. The word "*or*" is sometimes used as "*and*" in statutory enactments. It is not synonymous with "*and*" and is to be treated as interchangeable with it only when the obvious sense requires it, or when otherwise the meaning is dubious. In most instances the word "*or*," in its common use and also ordinarily in accurate meaning, has a disjunctive force. It marks an alternative and not a conjunctive. It indi-

cates one or the other of two or several persons, things or situations, and not a combination of them. *Commonwealth v. Keenan*, 139 Mass. 193; *Galvin v. Parker*, 154 Mass. 346; *Dumont v. United States*, 98 U. S. 142. It is construed as having a different meaning only when the context and the main purpose to be accomplished by all the words used seem to demand it, as was said by the court in *Gaynor's Case*, 217 Mass. 86, 89, 90.

The change of "and" to "or" appears to have been made in the enactment in question for the first time by the codification of the General Laws. Such a change so made would not work a change in the construction of the law when the legislation as to the relation of the two clauses of the measure had been clearly shown by earlier enactments. There is no reason inherent in the subject matter of the section why it should be construed as prohibiting the simultaneous use of both means of capital stock increase. That being so, and in view of the employment of "and" in the earlier statutes, I am constrained to say that, as used in the instant section of the statute, the word "or" has no disjunctive sense but is employed as though it had the common meaning of "and."

I therefore answer your first question in the affirmative.

2. The statute itself recites that "in whichever mode the increase is made the company shall within thirty days *after the issue* of such certificates, submit to the commissioner a certificate." The language of the statute compels an affirmative answer to your second question.

3. A holder of a certificate, even before the approval of the Commissioner given to a proposed increase in capital stock, is in the relation of a stockholder to the company and not that of a creditor, and I so answer your question 3 (a).

The Legislature has not made the approval of the Commissioner a prerequisite to the issuing of certificates, but specially designates that such approval is to be given after the issue.

The purpose of a statute such as this is the protection of the public against fraud through improper increases in stock or through ignorance of the extent of capital stock. The purchasers of the certificates become stockholders; though, if the approval of the increase is denied by the Commissioner, after such denial their status may change and they may then have certain rights to recover money paid in, as against the company. Prior to such event their status is not that of creditors but of stockholders. *Barrows v. Natchaug Silk Co.*, 72 Conn. 658; *Bailey v. Tillinghast*, 99 Fed. 801.

Inasmuch as the holders of the certificates for the stock as increased have the status of stockholders, they are entitled to receive dividends on such shares as they hold. If, however, the certificate of the Commissioner is later denied as to the increase of stock, the certificate holder may then, as between himself and the company, be liable to pay back the amount of such dividends, his liability in that respect depending upon the existence of various facts, which might differ in various cases. *Reed v. Boston Machine Co.*, 141 Mass. 454; *Thompson on Corporations*, vol. 5, 3661-6.

I therefore answer your question 3 (b) in the affirmative.

4. I am of the opinion that the legislative intent, as evidenced by the language used in the instant statute, viewed with regard to its earlier forms, is to treat each increase of capital stock as a single entity, though made in either one or in two manners simultaneously, and to provide for only one certificate of approval as to whatever issue, as a whole, is determined by the company to be made as an increase. The language of the instant statute —

"In whichever mode the increase is made the company shall, within thirty days *after the issue of such certificates, submit to the commissioner a certificate setting forth the proceedings thereof and the amount of such increase, . . . If the commissioner finds that the increase is made in conformity to law, he shall endorse his approval thereon.*" —

leads inevitably to the conclusion that the intent of the Legislature was to require a single endorsement of approval by the Commissioner, covering the entire issue of increased capital stock as voted by the company.

5. I answer your fifth question in the negative. However matters may stand as between holders of certificates of shares voted to increase the capital stock and the company prior to receiving the approval of the Commissioner, such approval is, by the terms of the statute itself, made a prerequisite to the transaction of business by the company itself "upon the capital as increased." To include in an official annual statement of the amount of paid-up capital stock of a company stock certificates issued in connection with an increase of capital stock is a form of transacting business upon the capital as increased, and one calculated to mislead the public, for whose protection this statute was chiefly enacted, if the increase of capital stock has not been already approved.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Insurance — Burglary — Transportation.

A company authorized to insure against any risk or hazard of marine or inland navigation or transportation insurance only may not insure against burglary in an assured's residence; nor may the Commissioner grant it a license so to insure, under G. L., c. 175, § 51 (g), as amended.

OCT. 17, 1930.

HON. MERTON L. BROWN, *Commissioner of Insurance.*

DEAR SIR:— You have asked me in a recent communication the two following questions relative to a domestic insurance company authorized by G. L., c. 175, § 51, as amended, to transact the kinds of business set forth in the first, second and eighth clauses of section 47 of said chapter 175, as amended.

"1. Is a domestic insurance company, authorized to transact business under said clause second, permitted under any of the provisions thereof to insure personal property against loss caused by any risk or hazard, including loss caused by burglary in the insured's residence?"

2. If you answer the preceding question in the negative, is the Commissioner authorized, under clause (g) of said section 51, to issue a special license to such a company to insure such property against loss caused by any risk or hazard, including loss caused by burglary in the insured's premises?"

You further state in your communication as follows:—

"This company issues a form of floater policy covering furs, jewelry and other personal property of the insured, or members of the family permanently residing with the insured, against all risks of loss or damage during 'transportation or otherwise.' This policy is intended to insure against loss caused by burglary in the insured's residence.

The company apparently contends that under the provisions of the second clause of said section 47 it has the right to insure personal property against loss caused by any risk or hazard or all risks or hazards.

Loss by burglary is insurable under clause twelfth of said section 47, and under said section 51, as amended, a fire or marine insurance company may not transact business under said clause twelfth."

The first and eighth clauses of said section 47 have no application to the questions which you have asked.

The pertinent portions of said section 47, as amended, read: —

"Second, To insure, (a) vessels, freights, goods, money, effects, and money loaned on bottomry or respondentia, against the perils of the sea and other perils usually insured against by marine insurance; (b) against risks of inland navigation and transportation; (c) in connection with marine or inland navigation or transportation insurance on any property, against any risk or hazard whether to person or to property, including legal liability on account of loss or damage to either, arising out of the construction, repair, operation, maintenance or use of the subject matter of such primary insurance; . . ."

The words "against any risk or hazard," in clause (c), read in their context, refer to any risk or hazard of marine or inland navigation or transportation insurance. Loss caused by burglary in the insured's residence has not in the past been treated by courts of authority as falling within "perils usually insured against by marine insurance," and it cannot well be said that the scope of such perils is enlarged by the use of the words "marine or inland navigation or transportation insurance." See III Op. Atty. Gen. 37, 42. I therefore answer your first question in the negative.

It has been held in an opinion of one of my predecessors in office (VII Op. Atty. Gen. 426), with which I concur, that the provisions of G. L., c. 175, § 51 (g), as amended, which reads, in part, as follows: —

"Such other form or forms of insurance coverage not included in the provisions of section forty-seven and not contrary to law as the commissioner in his discretion may authorize and license and which shall be transacted only upon such terms and conditions as he may from time to time prescribe and upon payment of the fee prescribed by section fourteen." —

do not empower the Commissioner of Insurance to authorize and license an insurance company to transact forms of insurance not included in the provisions of said section 47 when such forms are not otherwise lawful for such company to engage in; and since you advise me that the company as to whose rights you inquire may not lawfully transact business under said section 47, clause twelfth, as amended, which relates to burglary insurance, I am constrained to advise you that the Commissioner of Insurance has no authority to issue to it a special license to insure against burglary.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Eminent Domain — Easements of Light and Air — Land Adjoining State House.

None of the abutting landowners on Bowdoin and Derne Streets, overlooking the green space east of the State House, has an easement of light and air therein.

OCT. 21, 1930.

Recess Commission on the Supreme Judicial Court Building.

GENTLEMEN: — You ask my opinion on the following questions: —

“Whether or not owners of land adjoining the State House grounds on Derne and Bowdoin Streets would have further rights regarding light and air if a building was erected on said State House grounds, because of the possible dedication of said land as an open space; also whether or not the Commonwealth might be held liable for further damages on such account?”

In order to answer your questions thoroughly it was necessary to make a complete title examination of the land comprised in the so-called open space bounded by the State House on the west, Derne Street on the north, Bowdoin Street on the east, and Mount Vernon Street on the south, together with a title examination of the land bordering on Derne Street and Bowdoin Street overlooking the open space. The title search was complicated by the fact that Derne Street was not laid out until 1806, and in the eighteenth century was known as a cow path to the top of Beacon Hill. Also, in 1811 the top of Beacon Hill was removed, and that made it extremely difficult to scale distances mentioned in old deeds and plans from present landmarks.

As a result of this title search, we have found no easements of light and air in favor of the estates on Bowdoin Street and Derne Street which overlook the open space.

Easements of light and air can only be created by deed or covenant in Massachusetts. No such easements can be acquired by prescription. See *Lipsky v. Heller*, 199 Mass. 310. In that case the court said (p. 316): —

“But without express words a deed of land conveys no right to light and air over other lands.”

Brooks v. Reynolds, 106 Mass. 31, 32; *Salisbury v. Andrews*, 128 Mass. 336; *Ladd v. Boston*, 151 Mass. 585; *Baker v. Willard*, 171 Mass. 220.

If a grantor has said that an open space is not to be built over, or is to be kept open by the abutters, or its existence as an open space is shown to be absolutely necessary to afford light and air required for the enjoyment of the surrounding premises, there is an easement of light and air by implication. See *Schwoerer v. Boylston Market Assn.*, 99 Mass. 285; *Attorney General v. Williams*, 140 Mass. 329; *Case v. Minot*, 158 Mass. 577; *Emerson v. Wiley*, 10 Pick. 310; *Brooks v. Reynolds*, 106 Mass. 31.

There is no ground for creating an easement of light and air by implication in the present case, for in the first place the open space was, before it was taken by the Commonwealth for an open space, covered by buildings. The abutters on Bowdoin Street who overlook the open space derive their title from Daniel D. Rogers, who at one time owned the whole tract bounded by the State House on the west, Derne Street on the north, Somerset Street on the east and Beacon Street on the south. When he

deeded property on Bowdoin Street his deeds reserve no easements of light and air over his remaining property west of Bowdoin Street. There is likewise nothing to indicate that the grantees acquired such an easement by implication.

The same holds good of the abutting landowners on Derne Street who overlook the open space. As far as can be determined from old plans and records of title, the land north of Derne Street was owned by one Robert Turner, who held title through John Turner, who owned the land in 1665. Robert Turner is also the basic back title of Daniel D. Rogers, who owned the land comprising the present open space. The various deeds from Robert Turner down to Rogers disclose no easements of light and air reserved for that portion of the grantor of land north of Derne Street.

Furthermore, even if there were any easements of light and air not disclosed by our careful search, such easements would be wiped out by the takings by the Commonwealth, in 1888 by virtue of St. 1888, c. 349, and in 1892 by St. 1892, c. 404. By the terms of these acts there was a one-year statute of limitations imposed upon persons who might be aggrieved by the takings. If any persons had an easement of light and air over the land now comprised in the open space, their easements were cut off by the takings, and it is now too late for them to seek damages.

We now come to the question whether or not the abutting landowners on Bowdoin and Derne Streets overlooking the open space have acquired any easements, or rights in the nature of easements, of light and air in the open space by virtue of St. 1892, c. 404. This act was entitled "An Act to provide an open space on the east side of the State House Extension," and provided as follows:—

"SECTION 1. For the purpose of securing an open space around the state house, the state house construction commissioners are hereby authorized, in the name and behalf of the Commonwealth, to take by purchase or otherwise, within three months after the passage of this act, the whole of the tract of land in the city of Boston, bounded north by Derne street, east by Bowdoin street, south by Beacon Hill place, and west by the state house."

It is to be noted that the Commonwealth had already acquired title to all of this, with the exception of a parcel bordering on Bowdoin Street, by the taking of 1888.

In my opinion, there was no dedication of this land by the Commonwealth to public uses by the passage of this act. The purpose of the act was to provide an open space around the State House, not to provide an open space for the benefit of abutting landowners, or for the public at large. The abutting landowners have no easement of light and air on this open space by virtue of this act. Even if it could be held to be a dedication to the public as an open space, it would be competent for the Legislature to authorize a different public use by the exercise of its power of eminent domain. See *Codman v. Crocker*, 203 Mass. 146. The grantors of the land constituting this open space gave an unconditional fee to the Commonwealth, and they cannot claim damages if it is no longer used for an open space. The only conceivable way in which there could have been a dedication to the public as an open space would have been if the grantors, instead of having had their land taken by eminent domain and thereafter given confirmatory deeds, had banded together and offered this land to the Commonwealth for that purpose, and the Commonwealth had accepted it

for that purpose. In that case the grantors would have an interest to see that the original purposes were still being carried out, which they could only be deprived of by eminent domain.

But where there has been a taking by virtue of a statute, as in this case, for a public use, it is perfectly competent for the Legislature later to provide that the land shall be used for an entirely different public use. See *Boston v. Brookline*, 156 Mass. 172; *Old Colony R.R. Co. v. Framingham Water Co.*, 153 Mass. 561, and cases cited.

The only remaining question is: Have the abutting owners acquired by prescription an easement of light and air over this open space, having enjoyed it for more than twenty years. The answer is in the negative. Easements of light and air cannot be gained by prescription in this Commonwealth. See *Hampe v. Elia*, 251 Mass. 465; *Lipsky v. Heller*, 199 Mass. 310; *Tidd v. Fifty Associates*, 238 Mass. 421; *Keats v. Hugo*, 115 Mass. 204.

In addition to the common law of Massachusetts prohibiting such prescriptive rights, the Legislature has passed a statute prohibiting easements of light and air by prescription. See G. L., c. 187, § 1.

You are therefore advised that no one of the abutting landowners on Bowdoin and Derne Streets overlooking the open space to the east of the State House has an easement of light and air therein, and that the Commonwealth would be liable in damages to no one if the Legislature should provide for the erection of a building devoted to public uses on such open space.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Fish and Game Laws — Licenses — Convictions — Seizures.

Under G. L., c. 130, § 105, as amended, a second conviction for violation of the fish and game laws does not deprive the defendant of his license while an appeal is pending; nor, if he is convicted upon two complaints for violations of law arising from one act or from two acts committed at the same time, is he deprived of his license.

Although undersized shellfish or those taken from contaminated areas may be seized, motor vehicles in which they are contained may not be seized.

OCT. 28, 1930.

HON. WILLIAM A. L. BAZELEY, *Commissioner of Conservation*.

DEAR SIR: — You have asked my opinion upon three questions relative to the enforcement and administration of certain of the fish and game laws of this Commonwealth.

1. Your first question is whether a person licensed to take lobsters, who is twice within three years found guilty of a violation of the fish and game laws but who appeals from the second finding, would be by law deprived of his license before the final disposition of the case upon appeal.

G. L., c. 130, § 105, as amended by St. 1928, c. 21, reads, in part: —

“If a licensee under the preceding section” [which provides for the granting of licenses to catch or take lobsters] “is convicted a second or subsequent time within a period of three years of violation of the same or a different provision of the fish and game laws he shall immediately surrender his license to the officer who secured the second conviction,

and the license shall be void, and the licensee shall not receive another such license until after the expiration of one year from the date of the second conviction; . . .”

Assuming that the disposition of the first offense in the case supposed is a “conviction” under the principles about to be referred to, it is clear that the license does not become void by reason of the second finding of guilty unless the same is also a “conviction” within the meaning of said section 105.

One of my predecessors in office, Hon. Henry A. Wyman, rendered an opinion to the Commissioners of Fisheries and Game under date of September 22, 1919 (V Op. Atty. Gen. 401), with which I concur, which contains a full discussion of the question with relation not only to the specific case which you state but also to four other possible dispositions of complaints by the lower court. This opinion related to the meaning of the word “conviction” under Gen. St. 1919, c. 296, § 12, which provided, in part:—

“The certificate of any person who shall be convicted of a violation of any of the fish and game laws or of any provision of this act shall be void, and his certificate shall immediately be surrendered to the officer who secures such conviction, . . .”

G. L., c. 130, § 105, as amended, does not differ from this statute in any particular which would render the opinion referred to inapplicable to your question. Attorney General Wyman said in his opinion (p. 403):—

“Your fifth question is whether a conviction is had, within the meaning of this statute, where the defendant, pleading not guilty but being found guilty in the lower court and fined, appealed to the Superior Court. This question is, in my judgment, disposed of by an opinion rendered to the State Board of Health under date of Feb. 25, 1914, to the effect that the term ‘conviction’ in a similar statute implied a final judgment, and did not apply while an appeal was pending from a lower court. IV Op. Atty.-Gen. 157. It results from this that in the situation set forth in your fifth inquiry the defendant cannot be considered as having been convicted while his appeal is still pending.”

I answer your first question in the negative.

2. Your second question is based upon the following stated case: A person licensed under the fish and game laws is found at the same inspection to be violating two different provisions of those laws. Two separate complaints are thereupon brought against him and are tried together. He is convicted upon both complaints. You ask whether this licensee has then been convicted a “second or subsequent time,” within the meaning of G. L., c. 130, § 105, as amended.

In *Tuttle v. Commonwealth*, 2 Gray, 505 (1854), a defendant was found guilty by the jury on three counts in an indictment, each of which charged him with an illegal sale of intoxicating liquor under St. 1852, c. 322, § 7. The court sentenced him to pay a fine on the first of the three counts, an increased fine on the second count, and sentenced him to a fine and to imprisonment on the third count, in the same manner as if there had been three distinct convictions. It was held that this judgment was erroneous, since, in order to sustain a penalty increased and aggravated by conviction of a prior offense, the complaint upon which it is imposed must aver the prior conviction.

In your question you do not state whether the two separate complaints are brought at the same time or at different times; in view of the fact that the offenses were committed on the same occasion, however, this would be immaterial under the decision in *Commonwealth v. Daley*, 4 Gray, 209 (1855). It was held in that case that an indictment under St. 1852, c. 322, § 7, which alleged a previous conviction of a similar offense, was not supported without proof that the first conviction was before the commission of the second offense. The said statute provided for an increased penalty on a second conviction for an unlawful sale of liquor. The court said, at page 211, that, interpreted literally, the language of the statute would seem to justify the conclusion that it was necessary for the Commonwealth to prove only a previous conviction, without regard to the time when the offense on which such conviction was had was committed; but it was held that such a literal interpretation would contravene the true intent and spirit of the statute, the sole object of which was to deter persons from the repeated commission of similar offenses by imposing additional and severer penalties for each successive violation of law. The court said (p. 212):—

“The law does not seek to take vengeance upon its violators. It strives by its penalties to warn and hinder rather than to punish.”

The court also said (p. 213):—

“It is no answer to this view to say, that if a party has twice violated the law, he ought therefore to suffer the aggravated punishment without regard to the time when the offences were committed. Such an argument loses sight of the principle on which aggravated penalties are prescribed. That principle is that the offender is first to incur the lighter penalty, and be thereby subjected to the discipline which penal enactments are intended to exert upon the violators of law, before he can be liable to incur the more aggravated punishment.”

This decision was followed and further discussed in *Commonwealth v. Richardson*, 175 Mass. 202 (1900).

The principle so established applies to your second question, my answer to which is therefore in the negative.

3. Your third question is whether a warden, upon discovering in a motor truck or automobile either undersized or contaminated shellfish, may seize and confiscate both the shellfish and the vehicle.

G. L., c. 130, § 152, provides that “constables may arrest without a warrant any person found violating such laws, and detain him until a warrant for arrest for such violation may be applied for; and may seize any boat or vessel used in such violation, and her tackle, apparel, furniture and implements, which shall be forfeited,” and by G. L., c. 131, § 16, as amended by St. 1930, c. 393, it is provided that wardens shall have and exercise, for the enforcement of laws relating to fish, all the powers of constables. In my opinion, however, the use of the word “vessel” in G. L., c. 130, § 152, is confined to the sense of craft for navigation of the water and so does not include truck or automobile. Nor do I find elsewhere in the laws of the Commonwealth any provision authorizing the seizure or forfeiture of trucks or automobiles for the offenses named. G. L., c. 131, § 18, as amended by St. 1930, c. 393, provides that the —

“director, supervisor, wardens, deputies or members of the state police, may search any boat, vehicle, car, box, locker, crate or package . . .

where he has or they have reason to believe any fish . . . unlawfully taken or held may be found, and may seize any fish . . . so taken or held, which shall be disposed of in such manner as the director deems for the best interests of the commonwealth; provided, that this section shall not apply to fish . . . passing through this commonwealth under authority of the laws of the United States."

But no authority is given by this section to seize or confiscate any vehicle, truck or automobile. The penalties for transporting or causing to be transported shellfish taken from a contaminated area are set forth in G. L., c. 130, § 138, as finally amended by St. 1929, c. 372, § 25, but here again the Legislature has not provided for a seizure and forfeiture of a vehicle in which such shellfish may be found.

Accordingly, I answer your third question to the effect that although undersized shellfish or those taken from contaminated areas may be seized and confiscated under certain circumstances, motor trucks or automobiles in which they are contained may not be seized and confiscated.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

State Fire Marshal — Investigation of Fires — Discretion.

Under St. 1930, c. 399, the Fire Marshal must investigate all fires of suspicious origin, of which origin he has notice; and he may, in his discretion, investigate any fire.

OCT. 30, 1930.

GEN. ALFRED F. FOOTE, *Commissioner of Public Safety*.

DEAR SIR: — You request my opinion as to whether reports of fires by heads of fire departments to the Fire Marshal, under St. 1930, c. 399, § 2, are "for the purpose of enabling the Marshal to complete the investigation of such fires."

Section 2 of said chapter is as follows: —

"Heads of fire departments in cities, towns or fire districts shall investigate the cause and circumstances of every fire in their respective jurisdictions by which property has been destroyed or damaged, especially to ascertain whether it was caused by carelessness or design. They shall begin such investigation forthwith after such fire, and if it appears to the official making such investigation that the fire is of suspicious origin or is the result of a violation of law, or if he is unable to determine the cause, he shall immediately notify the marshal. All other fires by which a loss is sustained shall, within forty-eight hours, excluding Sundays and holidays, be reported in writing to the marshal. Reports required by this section shall be on forms furnished by the department, and shall contain a statement of all facts relating to the cause and origin of the fire that can be ascertained, the extent of damage thereof, the insurance upon the property damaged, and such other information as may be required. The marshal shall keep in his office a record of all fires occurring in the commonwealth, with the results of such investigations, and such records shall be open to public inspection."

Section 3 is as follows: —

"The marshal shall investigate or cause to be investigated the circumstances of all fires of suspicious origin of which he has notice, and may

investigate or cause to be investigated the circumstances of any fire. For such purpose the marshal, or some person designated by the commissioner, may summon and examine on oath, administered by the marshal or such person, any person supposed to know or have means of knowing any material facts touching the subject of investigation. Such witnesses may be kept apart and examined separately, and such examination shall be reduced to writing, and false testimony therein shall be perjury. Any justice of a district court or of the superior court, upon application of the marshal or person so designated, may compel the attendance of such witnesses and the giving of such testimony in the same manner and to the same extent as before said court. If, upon such investigation, the marshal or person so designated believes that the evidence is sufficient to charge any person with crime, he shall make a complaint therefor, and shall furnish the proper officers with the evidence and names of witnesses obtained by him. He shall, when required, report to the commissioner of insurance his proceedings and the progress in prosecutions instituted hereunder."

Section 8 is as follows: —

"The marshal shall report to insurance companies, to owners of property, or to other persons interested in the subject matter of an investigation of the cause and circumstances of a fire any information obtained by such investigation which may in his opinion require attention from or by such insurance companies, owners of property or other persons. He may also report to the head of the fire department the results of any investigation into fires of suspicious origin reported to him by such head as required by section two."

It appears from these sections that a head of a fire department shall forthwith begin an investigation of every destructive fire; and immediately notify the Marshal if it appears that (1) the fire is of suspicious origin, or (2) is the result of a violation of law, or (3) if he is unable to determine the cause; if no one of these three things appears, the fire shall be reported in writing to the Marshal within forty-eight hours of its occurrence, excluding Sundays and holidays.

Under section 3 the Marshal is required to investigate fires of suspicious origin of which he has notice; and has power, if he sees fit, to investigate any fire. A distinction is thus drawn between a fire of which the Marshal has notice that it is of suspicious origin and all other fires. As to the latter, the Marshal may investigate or not as he sees fit.

As I understand your question I answer it in the affirmative.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Warehouseman — License — Places of Business.

The license of a public warehouseman, given under G. L., c. 105, §§ 1-6, does not permit him to operate a warehouse anywhere within the Commonwealth but only in such city or town as is designated in the license and covered by a bond.

Nov. 17, 1930.

His Excellency FRANK G. ALLEN, *Governor of the Commonwealth*.

SIR: — You have asked me for an opinion relative to the law governing the licensing and bonding of public warehousemen, in connection with a letter written to Your Excellency.

I am of the opinion (1) that the statutes require that a public ware-

houseman should receive a license as such specifically for each city or town where he intends to operate, before he can do business therein; (2) that a license cannot be issued which will permit the licensee to do business generally in the Commonwealth, but that the license must be confined to a single city or town; (3) that he must file a bond in connection with each license; and (4) that within a single city or town as to which such license is issued the licensee is not limited to the operation of one warehouse but may operate more than one therein, and is not required to give more than one bond as a condition precedent to doing business in a single city or town.

Some confusion in an interpretation of the applicable statutory provision may at first sight appear to arise from the fact that in the codification of the General Laws certain words were omitted in connection with the laws governing warehousemen which had been employed in the earlier statutes. I am of the opinion, however, that the omission of these words does not indicate an intention upon the part of the Legislature to change the meaning of the provisions of the law, in the respects which I have noted, from what it was before the codification.

Prior to the codification of the General Laws in 1921, the applicable portions of the statute, R. L., c. 69, stood in substantially the same form and with the same meaning as the provisions of the earlier statutes upon the subject of warehousemen, beginning with St. 1860, c. 206. They were as follows:—

R. L., c. 69:

“SECTION 1. The governor, with the advice and consent of the council, *may license in any city or town* suitable persons, or corporations established under the laws of the commonwealth and having their places of business within the commonwealth, to be public warehousemen. Such warehousemen may keep and maintain public warehouses for the storage of goods, wares and merchandise. They shall give bond to the treasurer and receiver general for the faithful performance of their duties in an amount and with sureties to be approved by the governor, and may appoint one or more deputies, for whose acts they shall be responsible. A railroad corporation which is licensed as a public warehouseman shall not be required as such to receive any property except such as has been or is forthwith to be transported over its road or to give sureties on its bond.

SECTION 8. The secretary of the commonwealth shall, at the expense of each warehouseman, give notice of his license and qualification, of the amount of the bond given by him and also of the discontinuance of his license by publishing the same for not less than ten days in one or more newspapers, if any, *published in the county or town in which the warehouse is located*; otherwise, in one or more newspapers published in the city of Boston.”

In 1921 the Legislature, in establishing the codification known as the General Laws, repealed said R. L., c. 69, and re-enacted its subject matter contained in said sections 1 and 8 in the following form:—

G. L., c. 105:

“SECTION 1. The governor, with the advice and consent of the council, may license suitable persons, or corporations established under the laws of, and having their places of business within, the commonwealth, to be public warehousemen. Such warehousemen may keep and main-

tain public warehouses for the storage of goods, wares and merchandise. They shall give bond to the state treasurer for the faithful performance of their duties in an amount and with sureties approved by the governor, and may appoint one or more deputies, for whose acts they shall be responsible. A railroad corporation licensed as a public warehouseman shall not be required as such to receive any property except such as has been or is forthwith to be transported over its road or to give sureties on its bond.

SECTION 6. The state secretary shall, at the expense of each warehouseman, give notice of his license and qualification, of the amount of the bond given by him and also of the discontinuance of his license by publishing the same for not less than ten days in one or more newspapers, if any, *published in the county or town where the warehouse is located*; otherwise, in one or more newspapers published in Boston."

G. L., c. 105, § 1, differs from R. L., c. 69, § 1, in that the words "in any city or town" are omitted. Nevertheless, G. L., c. 105, contains in section 6 the same provisions that were in section 8 of the Revised Laws relative to publication of notice of license and qualification of a warehouseman, which clearly indicate that since such notice is required to be "published in the county or town in which *the* warehouse is located" the license is not intended to grant authority to the licensee outside a single municipality. This provision of G. L., c. 105, § 6, is utterly without meaning if the omission from section 1 of the words "in any city or town" is to be treated as altering the meaning of said section 1 so as to provide for a state-wide license. In order to give a meaning to the whole of the provisions of the re-enactment it is clear that the new section 1 of G. L., c. 105, must be interpreted as having the same meaning as R. L., c. 69, § 1. The omission of the words "in any city or town" from the first section of the new statute is to be treated merely as the removal of words considered as surplusage, and the re-enactment of the rest of the section with such omission will receive the same interpretation as that which was so plainly required by the older statute.

The provision for the giving of bond after license clearly appears to apply to operation under a license applicable to a specific city or town, and a bond is required before doing business in each city as to which a warehouseman may be given a license, notice of which is to be published in a newspaper, if any there be, in the county or town to which the license specifically applies and in which the warehouse is to be licensed.

The questions which were propounded in the letter to Your Excellency are as follows:—

"1. Does our license permit us to do business as public warehousemen anywhere within the Commonwealth?

2. Is it necessary to file a bond for each location?

3. Would it not be within the power of Your Excellency and the Council, in the event that a further bond is required from us, merely to increase the size of our outstanding bond and not provide that a separate bond shall be filed for each location?"

Under the opinion which I have expressed, the first of these questions should be answered in the negative, the second in the affirmative and the third in the negative.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Insurance — Life Policy — Medical Examination.

Each new policy of life insurance issued to one already insured by a life company must be preceded by a medical examination, under G. L., c. 175, § 123, as amended.

Nov. 17, 1930.

HON. MERTON L. BROWN, *Commissioner of Insurance.*

DEAR SIR:— In a communication to me you have set forth the following facts relative to a form of life insurance policy filed with you for your approval under G. L., c. 175, § 132, as amended:—

“The Penn Mutual Life Insurance Company has filed with me, under said section 132, a form of life policy which provides that the company will on the anniversary of said policy issue to the insured an additional policy on the same plan of insurance as the original policy at the attained age of the insured and at the company's premium rates in force, when said additional policy is issued, that the first year's premium on the additional policy shall be equal to the first year's dividend on the original policy and that the insurance under the additional policy shall be for such amount as said dividend will purchase at said rates and age. The additional policy, it is proposed, is to be issued without a medical examination.”

You advise me that you have disapproved the said form of policy on the ground that it provides for the issue of a new, separate and independent policy at a later date without a medical examination, contrary to G. L., c. 175, § 123, as amended, and that in so doing you relied upon an opinion of a former Attorney General rendered to you on October 31, 1925 (not published).

You have asked my opinion upon the following question of law:—

“Does G. L., c. 175, § 123, as amended, require that a life company, prior to the issue of an additional life policy pursuant to a provision in another life policy, previously issued by the company, for the automatic issue of such additional life policy and the payment of the premiums thereon by the application thereto of the dividends on the policy previously issued, give a prescribed medical examination to the person to be insured under such additional life policy, if said person underwent such an examination prior to the issue of the original policy?”

The answer to this question you must yourself have resolved in the affirmative in forming your determination to disapprove the form of policy which was presented to you. I am of the opinion that the correct answer to your question is, as you apparently decided, in the affirmative.

The opinion of one of my predecessors in office to a former Commissioner of Insurance, dated October 31, 1925, with which I am in accord and upon which you state that you relied in making your determination, requires an affirmative answer to your question unless the provisions of St. 1926, c. 93, enacted since said opinion was written, have worked a change in the law applicable to the facts which you state to have been in existence in relation to the policy form which you had before you and as to which your question relates. I am of the opinion that said St. 1926, c. 93, has not changed the law as set forth in said opinion as concerns the facts which you have stated.

St. 1926, c. 93, by amending G. L., c. 175, § 139, has in substance made the provisions of G. L., c. 175, § 123, as amended, which require a pre-

scribed medical examination of a prospective insured ninety days before the issuance to him of a policy of life insurance — with certain exceptions not applicable to the instant matter — inapplicable to the exchange, alteration or conversion of a policy of life insurance made at the request of the insured.

Upon the facts of the instant matter, as you have stated them in that part of your communication quoted above, the policy to be issued under the terms of the original policy submitted to you is not given in exchange for the original, is not an alteration of the original, is not a conversion of the original into a new form. It appears to be, as you have set the facts forth, a new policy, separate and distinct from the original, involving, as I have said, not an exchange, not an alteration, not a conversion of the original, though springing from a contractual right arising from the terms of the original, but is a new policy, additional and distinct from the original. It is therefore not one of those forms of policies as to which the provisions of said section 123, as amended, relative to medical expenses, are not to apply under the provisions of said section 139, as amended.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Secretary of the Commonwealth — Interpretation of Statute — Purchase of Publications.

The Secretary of the Commonwealth, under St. 1920, c. 413, as amended, may not purchase certain volumes of House Journals if they contain only journals for a single year.

Nov. 19, 1930.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR:— You have asked me the following question relative to your authority in purchasing House Journals published by the Massachusetts Historical Society.

“St. 1922, c. 164, provides for the purchase of copies of such journals reprinted in volumes covering three years, more or less. I respectfully ask your opinion as to my authority to purchase such volumes if they cover only one year.”

St. 1922, c. 164, reads as follows:—

“An Act reducing the number of copies of the journals of the House of Representatives of Massachusetts Bay from seventeen hundred and fifteen to seventeen hundred and eighty to be purchased and distributed by the State Secretary.

Section one of chapter four hundred and thirteen of the acts of nineteen hundred and twenty is hereby amended by striking out, in the ninth line, the word ‘five’ and inserting in place thereof the word:— three,— and also by striking out, in the twelfth line, the word ‘twelve’ and inserting in place thereof the word:— seven,— so as to read as follows:—
Section 1. Whenever the journals of the house of representatives of Massachusetts Bay from seventeen hundred and fifteen to seventeen hundred and eighty, inclusive, in volumes covering three years, more or less, shall be reprinted accurately by the Massachusetts Historical Society, in the manner and form of volume one, seventeen hundred and fifteen to

seventeen hundred and seventeen, inclusive, now in the press, and approved by the secretary of the commonwealth, the secretary shall purchase from the society three hundred copies of the said journals at a price not exceeding two dollars and fifty cents a volume, but in no year shall there be expended more than seven hundred and fifty dollars; provided that if the copies are plated, the plates shall be subject to use by the commonwealth."

The words "more or less," as applied to quantity, ordinarily connote a slight or unimportant variation from the numeral which they follow. They are sometimes used as if synonymous with "about." As used in connection with the context of the whole of the instant statute it can scarcely be said that the Legislature intended these words to mean a variation from the minimum number stated therein which would permit of the purchase of a volume containing the House Journals of only a single year.

It is obvious that the greater the number of volumes purchased the greater would be the amount spent by the Commonwealth, and that if each volume were to contain only the journals of a single year instead of two years, for example, the cost to the Commonwealth would be double. It appears to have been the legislative intent, as expressed in both the statute of 1920 and in the amendment of 1922, to provide for the purchase of yearly journals bound together.

I am of the opinion that you may not purchase the volumes in question if they cover only a single year. If items of expense make the publication of volumes containing more than a single year impracticable, resort should be had to the General Court for the enactment of new legislation appropriate to new conditions.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Division of Animal Industry — Tuberculous Cattle — Payments.

Payment under St. 1924, c. 304, may be made to the person who was the owner of a cow killed because of tuberculosis, if the animal has been inspected within six months prior to the killing and was proved to the Director to have been free from disease at the time of inspection, whether the claimant has owned such animal for sixty days before such killing or not.

Nov. 19, 1930.

HON. WILLIAM A. L. BAZELEY, *Commissioner of Conservation*.

DEAR SIR:— You request my opinion as to whether or not payment should be made under the provisions of St. 1924, c. 304, in the following case:—

"On November 5, 1929, a cow . . . was shipped into Massachusetts from New Hampshire on a certificate of health approved by the livestock authorities of New Hampshire and accepted by this Division. This cow was released and sold to a man by the name of Novin, by whom it was retained until on or about January 17, 1930, when the animal was sold to W. C. Slocum, of Dartmouth.

On February 15, 1930, the cow was quarantined by the inspector of animals at Dartmouth and on February 22nd it was condemned and killed by order of this Department, the post-mortem examination prov-

ing it to be affected with tuberculosis. Mr. Slocum claims indemnity amounting to \$25.00 on this animal."

St. 1924, c. 304, provides as follows: —

"SECTION 12A. If, under section eleven, any cattle affected with tuberculosis are killed, the full market value thereof at the time of condemnation, not exceeding twenty-five dollars each, shall be paid to the owner by the commonwealth if such animal has been owned by him for a period of not less than sixty days, and has been owned and kept within the commonwealth for six consecutive months, both periods being next prior to its killing, or if it has been inspected within said six months' period and satisfactory proof has been furnished to the director, by certificate or otherwise, that it was free from disease on the date of such inspection, and if the owner has not, in the opinion of the director, by wilful act or neglect, contributed to the spread of tuberculosis."

St. 1924, c. 304, provides for payment to be made to the owner of cattle affected with tuberculosis which are killed in the following two cases: (1) "If such animal has been owned by him for a period of not less than sixty days, and has been owned and kept within the commonwealth for six consecutive months, both periods being next prior to its killing"; and (2) "if it has been inspected within said six months' period and satisfactory proof has been furnished to the director, by certificate or otherwise, that it was free from disease on the date of such inspection."

In my opinion, the provision that cattle which are to be paid for must be owned by the claimant for a period of not less than sixty days is applicable only to the first case, as set forth in the preceding paragraph, and has no relation to a case where cattle have been inspected within the six months' period prior to the killing and satisfactory proof has been furnished to the Director that they were free from disease on the date of inspection.

I assume from the context of your letter that the cow in question had been so inspected within the said period, and that proof of freedom from disease at the time of such inspection, satisfactory to the Division of Animal Industry, had been furnished to such Division. If such be the facts, payment to the person who was the owner at the time the animal was destroyed would be legal.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

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RULES OF PRACTICE

IN INTERSTATE RENDITION.

Every application to the Governor for a requisition upon the executive authority of any other State or Territory, for the delivery up and return of any offender who has fled from the justice of this Commonwealth, must be made by the district or prosecuting attorney for the county or district in which the offence was committed, and must be in duplicate original papers, or certified copies thereof.

The following must appear by the certificate of the district or prosecuting attorney:—

(a) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled.

(b) That, in his opinion, the ends of public justice require that the alleged criminal be brought to this Commonwealth for trial, at the public expense.

(c) That he believes he has sufficient evidence to secure the conviction of the fugitive.

(d) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

(e) If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

(f) If the fugitive is known to be under either civil or criminal arrest in the State or Territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

(g) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever; and that, if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

(h) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

(i) If the offence charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretences, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required, or a sufficient reason given for the absence of such affidavit.

2. Proof by affidavit of facts and circumstances satisfying the Executive that the alleged criminal has fled from the justice of the State, and is in the State on whose Executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the State where the alleged crime was committed at the time of the commission thereof, and is found in the State upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate. (A notary public is not a magistrate within the meaning of the statutes.) It must also be shown that a complaint has been made, copies of which must accompany the

requisition, such complaint to be accompanied by affidavits to the facts constituting the offence charged by persons having actual knowledge thereof, and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application. The affidavit or affidavits should contain sufficient facts to make out a *prima facie* case of guilt, and should not be a reiteration of the form of the complaint nor contain conclusions of law.

5. The official character of the officer taking the affidavits or depositions, and of the officer who issued the warrant, must be duly certified.

6. Upon the renewal of an application, — for example, on the ground that the fugitive has fled to another State, not having been found in the State on which the first was granted, — new or certified copies of papers, in conformity with the above rules, must be furnished.

7. In the case of any person who has been convicted of any crime, and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff, or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

8. No requisition will be made for the extradition of any fugitive except in compliance with these rules.



